IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 185.

EL PASO BRICK COMPANY,
Appellant.

vs.

JOHN H. McKNIGHT,
Appellee.

Appeal from the Supreme Court of the Territory of New Mexico.

BRIEF FOR APPELLEE.

EUGENE S. IVES,
Attorney for Appellee.

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STATEMENT.

Prior to December, 1900, the appellant was in the possession and control of the International claim upon which there was a large deposit of red shale, which was being used by appellant in the manufacture of brick.

On the 15th of December, 1900, E. Hewitt Rogers and others, located the Aluminum claim upon ground contiguous to the International claim, and upon the 31st of

March, 1902, the same parties located the Hortense claim, which was similarly situated.

The locators of the Aluminum and Hortense claims conveyed the same by divers mesne conveyances to the appellant, without consideration.

It was found by the Court, that neither the locators of the Hortense or Aluminum claims, nor the appellant, nor its predecessors in interest performed any assessment work upon either of said claims for the years 1904 and 1905. (R. 140). It is stated in the opinion that no evidence was offered by either the appellee or the appellant tending to bear directly upon the question as to whether any such assessment work was done.

The appellee proved that the proof of assessment work had not been filed as authorized by statute, undertaking thereby to raise the statutory presumption that such assessment work had not been done.

The Clerk of the Probate Court testified that he had searched his records, and that between the first day of January, 1900, and the 30th day of December, 1907, he found but two proofs of labor, one of which was filed on the 8th day of January, 1905, and the other on the 28th day of December, 1906.

Counsel for the appellee thereupon offered certified copies of such proofs for the purpose as stated by him, without objection from opposing counsel, "of showing in connection with the testimony of the witness, that there have been no satisfactory proofs of labor filed for any year prior to the year 1906." (Opinion R. 171). These proofs are marked "Exhibits Q and R" and appear at pages 51 and 52 of the Record. The proofs speak for themselves, and are manifestly insufficient and without effect.

Exhibit R makes no reference to work done in either of the years 1904 or 1905.

Exhibit Q does refer to work done in 1903 and 1904.

In the Supreme Court of New Mexico the appellant admitted that its affidavit was objectionable upon two grounds:

First: That it was not filed within the time required by the Act.

Second: That it did not give the name or names of the person or persons who performed the work, other than that it was done and performed by the appellant. (Opinion R. 170).

The appellant contends in its brief filed in this Court that this affidavit was sufficient under the New Mexico statute to raise a presumption that the assessment work was done.

The Supreme Court of New Mexico and the trial court both held to the contrary, and such holdings were not assigned as error in either the Supreme Court of New Mexico or in this court.

Appellant contends, however, that these affidavits, though ineffective as constituting the statutory proofs of labor, should be regarded as evidential, with the same effect as if the affiant had appeared at the trial and testified to the facts which are set forth in his affidavit.

The Trial Court regarded such exhibits as merely establishing the negative fact for which the plaintiff was contending, to-wit, that they being insufficient and no other proof having been filed, the statutory proofs of labor had never been filed, and that therefore, under the decision of its Supreme Court of New Mexico in the case of Upton

against Santa Rita Co., the burden of proving that assessment work had been done, was shifted upon the appellant. The issue thus raised constitutes one of the assignments of error and will be considered later.

On the first of April, 1905, the appellee located the Lulu and Agnes claims upon territory embraced within the lines of the Hortense and Aluminum. The notices of location of these claims described the same as being situated in the County of Dona Ana, and as beginning at a monument of stones tied to a railroad yard limit post on the line of the Southern Pacific Railroad.

It was contended at the trial that these notices of location were indefinite. The court found to the contrary. Such finding was assigned as error to the Supreme Court of New Mexico, and that court held that it would not disturb it. (R. 172). The contention has been abandoned by appellant in its assignments of errors and brief in this court.

If it be determined in favor of the appellee that the Court properly found that the assessment work had not been done upon the Hortense and Aluminum claims, then the right of the appellant to the territory covered by the Lulu and Agnes falls, without respect to the other questions raised by the assignments of error and argued in appellant's brief.

On the 2d of August, 1905, the appellant made application to the Land Office for a patent for the International, Hortense and Aluminum claims. The application was accompanied with a proof of posting of the plat and notice. The proof was to the effect that such plat and notice had been posted on the 10th of June, 1904, and consists of the affidavit of two persons, executed before a Notary Public

in the State of Texas, and not before an officer authorized to administer oaths within the land district where the claims are situated.

On the 23rd of October, 1905, the Receiver of the Land Office accepted from the appellant the amount required by the United States as the purchase price of the two claims, the Hortense and Aluminum, and issued to the appellant a final receipt.

On the 10th day of April 1906, the Commissioner of the Land Office, upon his own initiative, and upon various protests of the appellee and others, presented against the allowance of the patent, rendered his decision, finding the entry to be defective for a number of reasons, among others, that the affidavits as to posting were not executed within the Land District; that the Hortense claim contained an excess in area; that the requisite lines were not shown; that the mineral character of the land did not satisfactorily appear; and that the Aluminum and Hortense claims were irregular in shape, and no sufficient reason was shown for the failure to conform them as near as practicable with the United States system of public land surveys.

The appellant was granted sixty days in which to show cause why the entry should not be canceled.

Notwithstanding this adverse decision the appellant made no effort to relocate the ground. In May, 1906, the appellee re-located the territory embraced within the Lulu and Agnes claims, and located other territory adjacent and contiguous thereto, which territory so re-located and located, was covered by five claims, named respectively, the Lulu, the Agnes, the Lynch, the Tip Top and the Aurora.

The appellant filed with the Commissioner of the Land Office numerous affidavits and exhibits, designed to over-

come the above mentioned objections, and among them, certain affidavits executed before a Notary Public within the Land District, showing the fact of the seasonable posting on the land.

On the 4th of September, 1906, the Commissioner of the Land Office, after a full hearing, rendered his decision canceling appellant's entry. From such decision the appellant appealed to the Secretary of the Interior.

On the 9th of September, 1908, the Secretary rendered his decision upon such appeal, whereby he affirmed the decision of the Commissioner of the Land Office, and held the entry for cancellation. This decision is set forth in full in the eighth Finding of Fact. (R. 144-149).

It appears that the Secretary considered it necessary to discuss but one feature of the case, namely, the original affidavit as to posting.

He held that, the affidavit was fatally defective; that such defect was not a mere irregularity which might be cured by the subsequent filing of a properly verified affidavit; that the observance of the statutory provisions is among the essentials to the jurisdiction of the local officers to entertain the patent proceedings. That the register was without authority to direct the publication of the notice, and that the notice was a nullity and ineffectual for any purpose, and, "the patent proceedings, therefore, fail, and the entry will be canceled."

The Secretary continued:

> "The appellant company puts forward a further and alternative contention, to the effect that even if the entry should be considered defective, yet it should be submitted for equitable consideration under said sections 2450 and 2457 of the Revised Statutes. This

disposition can not be made of the case, *for the reason that the record shows that there are alleged adverse claims.*" * * * * (R. 149).

On the 24th of November, 1908, and while the appellant still had the right under the rules to apply for a rehearing, it appeared voluntarily and waived its right to ask a review, and thereupon such decision and the cancellation of the entry became final and the entry was canceled on the records of the Land Office. (R. 149).

On the 11th of September, 1908, two days subsequent to the decision by the Secretary of the Interior, and six weeks prior to the waiver by appellant of its right to ask for a review of the Secretary's decision, the appellant located the territory embraced within the Hortense and Aluminum claims, such territory being then a part of the territory covered by the five claims as aforesaid by the appellee.

The appellant subsequently made application to patent the claims so re-located in September, 1908, and the appellee adversed, and duly brought this suit.

The appellant alleged that the appellee had not performed its assessment work upon the claims located by him, but evidence was duly submitted and the Court found upon sufficient evidence that appellee had done the necessary assessment work.

The only substantial contention of the appellant is that the territory embraced within the original locations of the Hortense and Aluminum claims was by virtue of the entry attempted to be made in August, 1905, segregated from the public domain, and that, therefore, the attempted locations of the five claims by the appellee were not upon unappropriated public domain, and were void.

The appellant furthermore contends, without respect to any of the substantial issues heretofore suggested, that

the appellee neglected to prove that the territory so located by him was a part of the public domain, and that therefore, the appellee, having failed to affirmatively establish his case, has no standing in Court.

This contention is purely technical, and as we shall hereafter indicate, is without merit.

To recapitulate, the various locations and proceedings may be stated in their chronological order, and with their respective dates, as follows:

Prior to December 5, 1900, the El Paso Brick Company, appellant, was organized, and in possession of the International claim.

On December 14, 1900, Rogers and others located the Aluminum claim.

On March 31, 1902, Rogers and others located the Hortense claim.

Prior to April, 1905, the Hortense and Aluminum claims were conveyed to the appellant without consideration.

No assessment work was done upon the Hortense and Aluminum claims for the years 1904 and 1905.

April 1, 1905, the appellee located the Lulu and Agnes.

August 2, 1905, appellant made application for patent for the Hortense and Aluminum, and obtained his final receipt.

April 10, 1906, the Commissioner of the Land Office, rendered decision that entry was defective, and ordered appellant to show cause why the same should not be canceled.

May, 1906, appellee re-located the Lulu and Agnes, and located the Lynch, Tip Top and Aurora.

September 4, 1906, the Commissioner of the Land Office, after hearing, rendered decision canceling the entry.

September 9, 1908, the Secretary of the Interior affirmed the decision of the Commissioner of the Land Office

September 11, 1908, appellant re-located the Horterse and Aluminum.

November 24, 1908, the appellant waived before the Secretary its right to ask for a review of the Secretary's decision, and the decision and cancellation of the entry became final.

Upon the foregoing facts and the pleadings appellee respectfully submits the following propositions:

I.

THE FINDING OF THE COURT THAT NO ASSESSMENT WORK WAS DONE UPON THE HORTENSE AND ALUMINUM CLAIMS FOR THE YEARS 1904 AND 1905 IS SUSTAINED BY THE EVIDENCE.

II.

IT IS ADMITTED BY THE PLEADINGS THAT APPELLANT DID NOT RESUME WORK PRIOR TO APPELLEE'S LOCATIONS OR RELOCATIONS.

III.

APPELLANT HAD THE BURDEN OF PROVING RESUMPTION OF WORK BEFORE LOCATION BY APPELLEE.

IV.

THE FINAL RECEIPT ISSUED TO APPELLANT IN THE LIGHT OF THE SUBSEQUENT ADJUDICATION REJECTING APPELLANT'S APPLICATION FOR PATENT AND CANCELING SUCH FINAL RECEIPT WAS INEFFECTIVE TO SEGREGATE THE LANDS FROM THE PUBLIC DOMAIN PENDING THE ADJUDICATION AS TO ITS VALIDITY, AND THIS WITHOUT RESPECT TO WHETHER SUCH FINAL RECEIPT WAS VOID AB INITIO OR ONLY VOIDABLE.

V.

THE ENTRY OF APPELLANT WAS VOID AB INITIO AND A NULLITY.

VI.

THE TERRITORY EMBRACED WITHIN APPELLEE'S CLAIMS WAS A PART OF THE PUBLIC DOMAIN.

VII.

THE ORIGINAL LOCATIONS OF THE HORTENSE AND ALUMINUM WERE VOID FOR THE REASON THAT THE LOCATORS WERE DUMMIES USED BY APPELLANT TO THE END THAT IT MIGHT EVADE THE UNITED STATES LAW AND LOCATE MORE THAN TWENTY ACRES OF LAND IN ONE CLAIM.

I.

THE FINDING OF THE COURT THAT NO ASSESSMENT WORK WAS DONE UPON THE HORTENSE AND ALUMINUM CLAIMS FOR THE YEARS 1904 AND 1905 IS SUSTAINED BY THE EVIDENCE.

This finding of the court is assailed in the eleventh and twelfth assignments of error, which are as follows:

> "Eleventh. Said court erred in not holding that the affidavit made by W. F. Robinson, president of appellant, introduced in evidence by appellee and which showed that appellant had done the annual labor of One Hundred ($100.00) Dollars required by the Statutes of the United States on and for each of said "Hortense" and "Aluminum" claims during and for the year 1904 was not evidence of the facts stated in such affidavit and particularly the fact that such work had been done.
>
> Twelfth. The said court erred in not holding that the affidavit of W. F. Robinson introduced in evidence by the appellee, and which showed that the appellant had done and performed the annual labor of One Hundred ($100.00) Dollars required by the Statutes of the United States to be done on mining claims each year for and on both said "Hortense" and "Aluminum" claims for and during the year 1904, said affidavit being the only evidence on that point, was not conclusive proof that appellant had done the annual labor aforesaid on and for each of said claims during and for the year 1904." (R 159)

Counsel for appellant in their brief depart from these assignments and from the position assumed by the appellant in the Supreme Court of New Mexico, and contend that such finding of the court is erroneous upon the following grounds:

(a) *That the affidavit of Robinson was sufficient under the New Mexico statute.*

(b) *That the New Mexico statute conflicts with, and must give way, to the Federal statute; and*

(c) *(being the only ground covered by the assignments of error) that the affidavit is evidence of all the facts it recites.*

These contentions will be considered seriatim.

(a) *The affidavit was insufficient.*

Section 2315 of the Compiled Laws of New Mexico of 1897, is as follows:

> "The owner or owners of any unpatented mining claim in this Territory, located under the laws of the United States and of this Territory, shall, within sixty days from and after the time within which the assessment work required by law to be done upon such claim should have been done and performed, cause to be filed with the recorder of the county in which such mining claim is situated, an affidavit setting forth the time when such work was done, and the amount, character, and actual cost thereof, together with the name or names of the person or persons who performed such work; and such affidavit, when made and filed as herein provided, shall be *prima facie* evidence of the facts therein stated. The failure to make and file such affidavit as herein provided shall in any contest, suit or proceedings touching the title to such claim, throw the burden of proof upon the owner or owners of such claim to show that such work has been done according to law."

Prior to the trial this statute had been construed by the Supreme Court of New Mexico.

> Upton vs. Santa Rita Mining Co., 14 N. M. 96; 89 Pac. 275.

The appellee sought to show that no affidavit of the character provided by the statute had been filed within the time prescribed and hence to throw upon the appellant the burden of proving that such work had in fact been done.

For this purpose it was proven that the only affidavits on file were made and filed long after the expiration of the statutory period, and that the affidavits did not conform to the statutory requirements. The date of recording of these affidavits showed that they were not filed within the time required by the statue in order to have the effect of prima facie evidence of the facts stated in them.

The affidavit is also defective in that it did not state the name or names of the person or persons who performed the work.

As stated in the opinion of the Supreme Court of New Mexico it was admitted by counsel for appellant before that court that the affidavit was defective in these two particulars. Despite this admission and the fact that such ruling is not questioned by the assignments of error in either the Supreme Court of New Mexico or this court, counsel for appellant argue in their brief in this court that the affidavit was sufficient in that it stated that the work was done by the El Paso Brick Company and that it was filed in time, because the provision of the New Mexico statute as to time should be construed as being directory only.

It would seem to us that the construction given the statute by the Supreme Court of New Mexico will, under the general rule of this court, prevail.

It seems, however, manifest that the language of the statute, "the name or names of the person or persons" repels the interpretation sought to be given it by counsel.

Nor are we impressed with counsel's reasoning, that the requirement as to the time of filing should be construed as being directory only.

This argument is based upon the próposition that the statute in question should be strictly construed for the reason that it is "undoubtedly in derogation of the common law right of the locator." The statute is primarily for the benefit of the locator. It enables him, if he has actually caused the assessment work to be done, to prepare and file affidavits made by the persons who did the work, and thus, in the event that the doing of his assessment work should be at any time challenged, permits him to establish the fact by evidence which but for the statute would be incompetent.

If the provision that the affidavits should be prima facie evidence that the assessment work had been done had been omitted from the statute, and it had simply provided that unless a locator should file affidavits within sixty days after the doing of the assessment work, the burden of proof should be upon him to establish that he had done it, then the statute would be in derogation of the right of the locator, but even then we do not believe that under the recognized rules of interpretation, the requirement as to time should be regarded as directory only.

Nor is the statute in any sense in derogation of a common law right. The whole subject of mining locations and the right of a person to acquire rights in mineral lands is foreign to the common law. It rests entirely upon statute.

It is significant that the affidavit was not filed until June, 1905, a little over two months after the appellee had by his diligence or good fortune discovered valuable mineral upon this abandoned territory.

The appellant had in the International claim consisting of over 130 acres (more than the aggregate of appellee's five claims), a super abundant supply of the red shale which it used in its business of manufacturing brick, and obviously abandoned the Hortense and the Aluminum as valueless to it. It was not until the appellee discovered deposits of valuable fire clay upon the territory which it had formerly owned, that the appellant, desirous to avail itself of the fruits of appellee's enterprise, became active in its efforts to file proofs and secure patents.

(b) *The New Mexico statute does not conflict with the Federal statute.*

This contention of counsel for appellant is not covered by the assignments of error and was not raised before the Supreme Court of New Mexico, and under the rule adopted by this court will perhaps not be considered by it.

We submit, however, that in any event the point is without merit.

Idaho has a statute similar to that of New Mexico. The only difference as pointed out in appellant's brief, consists in that the Idaho statute provides that the failure to file the affidavit shall be considered prima facie evidence that the labor had been done, whereas it is the provision of the New Mexico statute that such failure shall throw the burden of proof upon the owner of the claim to show that such word has been done.

Neither statute is in conflict with Section 2324 of the Revised Statutes of the United States. That statute provides that upon a failure to do the assessment work the claim shall be open to re-location, and the courts have held that in cases where the fact of the doing of the assessment work is an issue, the general principle of law that the burden of proof is upon him who asserts a forfeiture is applicable.

We agree with counsel that the construction of a statute becomes part and parcel of it, and we question very much the validity of any enactment which would be inconsistent with the construction which this court had put upon a Federal statute.

The New Mexico and Idaho statutes, however, do not tend to affect the construction or meaning of the Federal statute. They simply go, as stated in Lindley on Mines, Section 636, to the nature, degree and effect of evidence, and are therefore, as concluded by that eminent authority on mining law, unobjectionable.

It is stated in counsel's brief that in Idaho and New Mexico alone is the Federal statute so applied.

It appears, however, that the congress itself in March, 1907, enacted with respect to the Territory of Alaska, as follows:

> "the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the

time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements."

Federal Statutes (Supplement 1909), p. 25.

It would seem, therefore, that congress had prior to the decision by the Supreme Court of New Mexico in Upton vs. Santa Rita Mining Company, expressed its approval of the wisdom of the New Mexico statute, and it is a fair deduction from such enactment of congress, in conjunction with the fact that congress did not amend paragraph 2324 of the Revised Statutes, that congress regarded the New Mexico statute not only as not in conflict with the Federal statute, but as being in harmony with and supplemental to it.

No possible injustice can result from the statute. The appellant could have availed itself of it if it had so pleased. At the trial counsel knew of the New Mexico statute and of its construction by the Supreme Court of that Territory. They of necessity knew that the appellee would prove appellant's failure to file the proof, and thus throw upon it the burden of establishing that the assessment work had been done. They were not, therefore, taken by any surprise, and yet, as appears by the findings, they offered not one scintilla of evidence as to any assessment work during the years 1904 and 1905.

As we have seen they became active in the spring of 1905, immediately after the valuable discoveries of appellee; and had any assessment work been done within a few months prior to their awakening to the value of this abandoned territory, the evidence of it would certainly at that time have been available. The conclusion is inevitable that there was no such evidence for the very sufficient reason that no such work had been done.

As we have stated, the entire subject of mining locations rests upon statute; it follows that except as restrained by positive act of congress a state or territory has the right to impose such conditions as it may see fit.

2 Lindley on Mines, Section 636;

1 Lindley on Mines, Section 249;

Providence G. M. Co. vs. Burke, 6 Ariz. 323, 57 Pac. 641.

It was therefore within the province of the legislature of New Mexico to provide for a record of the performance of the required annual labor or impose and to prescribe the legal effect of noncompliance with its provisions, and such statutes should be given a reasonable, rather than a strict construction.

(c) *The affidavit is ineffective for any purpose other than to establish the fact that no proof of assessment work for the years* 1904 *or* 1905 *was recorded in pursuance of the Territorial statute.*

The appellee proved by the recorder that no affidavits were filed by or on behalf of appellants prior to 1907 except two. Certified copies of these two affidavits with the certificates of record indorsed on them were then offered in evidence by appellee "for the purpose of showing in connection with the testimony of the witness that there had been no satisfactory proofs of labor filed for any year prior to the year 1906." (Opinion p. 171.)

It is apparent therefore that the affidavits were not offered generally, but for a limited purpose only and that such purpose was clearly stated and sharply brought to the attention of the court and opposing counsel. Nevertheless it was argued before the Territorial Supreme Court, and it is now insisted that, notwithstanding the limited purpose for which they were offered, the affidavits must be con-

sidered as evidence of the facts stated in them, and hence that they constitute evidence tending to prove that the work was actually done.

It must be conceded that as a general rule, ex parte affidavits are not competent evidence upon the trial of an issue in favor of the party making them unless made so by statute; and in order to be used as evidence when permitted by statute, the statutory provisions must be strictly complied with. Such statutes, being in derogation of the common law, are strictly construed, and must be strictly complied with.

1 Enc. Pl. & Pr. 334-335.

II Wigmore on Evidence, Sec. 1384.

It is apparent, therefore, that the affidavits were not competent evidence in favor of the appellant, and must have been excluded had it offered them as evidence of the facts stated in them.

Hence, unless the appellee made the affidavits themselves, as a statement of the facts set forth in them, evidence, notwithstanding the express limitation of the purpose for which they were offered, they can not be considered as evidence except for the particular purpose stated.

The correct rule is, as gathered from the authorities, that a party may offer a document for a particular purpose, especially one not having reference to the truth or otherwise of the facts set forth in the document, and that when so limited, the document can be considered only for the purpose for which it was offered.

In Succession of Murray, 41 La. Ann. 1109, 7 So. 126, a will was offered in evidence for the purpose of showing that it contained certain defects in form. It was contended that having been offered in evidence, the document was in

evidence for all purposes, notwithstanding the limited purpose for which it was offered.

This contention was overruled, and in the syllabus, prepared by the court, the rule is thus stated:

> "A party, in offering written documents in evidence, has the right to restrict their effect as evidence to a definite purpose, and is not compelled to offer them for whatever they may be worth as evidence."

In St. L. & S. F. Ry. Co. vs. May, 53 Tex., Civ. App. 257, 115 S. W. 900, an action to recover damages for delay in transporting cattle, the defendant offered in evidence a portion of the claim presented by the plaintiff for the purpose of showing that the claim for damages presented by the plaintiff was less than that claimed in the action. Against objection the plaintiff was permitted to introduce the remainder of the claim which set forth certain alleged negligence of the defendant. This was held error, the court saying:

> "The rule which permits the plaintiff to introduce the entire instrument when the defendant had offered only a part is based upon the principle that a reading of the entire instrument is essential to a proper understanding of the portion offered, and is justified only when that is the case. * * There is no legal reason why the application of this rule should be made use of merely to get before the jury declarations or statements which are otherwise inadmissible."

In Henderson vs. Givens, 16 Ala. 261, the plaintiff offered in evidence the record of a suit in another court for the purpose of showing that a judgment had been rendered. The record being in evidence, it was sought to be used by the defendant as proof beyond the purpose for which it was offered, but this was not permitted, the court saying:

> "The record of the cause in chancery * * was clearly admissible for the purpose of showing a final

decree had been rendered adverse to the plaintiff. * * The defendant might show that it did not establish the facts assumed: but the plaintiff's having used the record for a legitimate purpose, did not entitle the defendant to avail himself of it, as proof of facts of which it would not have been primary evidence for him."

In Chesapeake Bank vs. Swain, 29 Md. 483, the action of the lower court in refusing to allow defendant to use other items of account, which it was claimed explained or controlled the items offered, where the items were offered for the purpose of verifying the testimony of a witness, was upheld, the court saying:

"The single entry in the bank book, kept by the plaintiffs with the defendant, of the deposit made on the 30th day of December, 1861, was offered in evidence by the plaintiffs, for the purpose of verifying the testimony of the witness Habliston, and of showing the nature of the particular entry made by the defendant at the time, as indicative of the character of the deposit in question. It was not offered to show the general state of the account contained in the book, but simply to show the character of one entry therein, as that might reflect upon the nature of the contract under which the deposit was made. The plaintiffs, therefore, were not bound to put in evidence all the other entries in the book: and when the books were placed in the power of the defendant, to be used by it as evidence for any legitimate purpose that might be thought proper, we think nothing more could reasonably be required."

So in Abbots vs. Pearson, 130 Mass. 191, the court held that the introduction of an item in a book for the purpose of fixing a date, did not make the whole book or other entries not explaining the one introduced, competent.

The argument of the appellant upon this question, is seemingly based upon a misapplication of the rule of evidence, denominated by Professor Wigmore, a rule of completeness, in which counsel for the appellant, and some courts, have confused the rule with a case where evidence is offered for a purely collateral purpose as in the instant case. The rule is discussed at length by Wigmore, in 2 Wigmore on evidence, Section 2112, et seq.

The rules with reference to the admission of a portion of a paper or document, has been the subject of numerous discussions by courts and text writers, and the rules applicable thereto may without much difficulty be deduced. Wigmore probably has the most philosophical and orderly discussion of the whole subject in sections of his work above referred. But, ignoring Wigmore's exact language, the rules may be fairly stated as follows:

1. Where a part of a document is introduced, or the whole introduced and only a part used, as primary evidence of the facts stated in the document, all the remainder that explains or qualifies the part introduced or used, may be introduced by the other party, in order that the particular part may be presented in its real effect and meaning.

2. When an item or items of an account are introduced, other items are used for evidential purposes to effect or throw light upon the particular item or items introduced.

3. Where a document or a part of a document is introduced for a specific purpose, the remainder can not be used evidentially by the opposite party unless primarily admissible on his part.

Most of the cases cited by the appellant come within the first or second rules. In most of them the remainder of the document where only a part was offered, was offered by the opposite party, as in Payne vs. Wilson, 146 Fed. 488.

In others the remaining portion of the document was held to be primary and admissible on the part of the other party as in Greenleaf's Lessee vs. Birth, 5 Peters 131.

In others the remainder of the document was used without objection, as in United States vs. Homestead Mining Co. 117 Fed. 481.

In some, as in Sill vs. Reese, 47 Cal. 340, general language is used, which if taken literally bears out the view of counsel, but the discussion is of the most general character and the facts of the case are entirely different from those in this and the cases cited in this brief.

In this case the affidavits were vitally defective and it was so conceded by appellant. The plaintiff offered them for the sole purpose of showing that they were not in compliance with the statute and hence that in legal effect, no affidavits at all had been filed, and the burden of proof had in consequence been shifted to the other party. In any case where it is claimed that an affidavit is insufficient under the statute, obviously the best evidence of what the affidavit does or does not contain, is the affidavit itself. Without proof of the loss or destruction of the affidavit or its record, a party claiming the affidavit to be insufficient would be bound to introduce the affidavit as proof of what it did or did not contain. If a plaintiff seeks to cast upon his opponent the burden of proving that the annual work on a mining claim had been done because of lack of a proper affidavit, he must of necessity introduce the affidavit, if one has been filed, for the purpose of proving its own insufficiency. If, notwithstanding the fact that he offers it for that sole purpose and carefully limits his offer to that one purpose, the affidavit nevertheless ipso facto becomes evidence for the other party of every fact stated in it, the statute might as well be repealed.

It must be borne in mind that the affidavit would be entirely inadmissible if offered by the defendant. It was not in fact offered in evidence by the defendant at the trial. It now seeks to avail itself of the affidavits as evidence that the work was done, notwithstanding the obvious insufficiency of the affidavits which could only be evidence in its favor if sufficient under the statute. The case ought to be governed by the rule laid down by Succession of Murray, 7 So. 126, 41 La. Ann. 1109, that a document may be introduced for the sole purpose of showing its own defects, without thereby making it evidence in favor of the other party as the matters stated in it.

To illustrate: Suppose it were to be a material inquiry whether a certain document was written upon blue paper. A party introduces it for the sole purpose of showing that the paper on which it is written is not blue but white. Could the opposite party thereupon claim that every statement in the document had thereby been made evidence? Could it be claimed that a document so introduced and every statement in it, however otherwise inadmissible, had by its introduction for that special purpose been made evidence against the party offering it? The illustration shows the unsoundness of the rule for which the appellant contends.

Instances might be multiplied in which a document, introduced for an entirely collateral purpose, might be used as evidence in favor of a party who could not introduce it himself.

The quotation from 17 Cyc. 52, contained in appellant's brief, on its face sustains his view, but when the authorities on which the statement is based are examined, they wholly fail to lay down any such doctrine. All of them, so far as they are available at this writing, are cases where a document was used by one of the parties, and it was held that he

could not complain if his opponent used it, but in every case the purpose of introducing the document was not expressly limited, but either the whole or a part of it was introduced or used generally. The text based upon the case of Winants vs. Sherman, 3 Hill 74, where the bare statement is contained, and the citation contrary of the case of Succession of Murray, supra, seems to be a simple case of an author's selection of authority, with no more force than such selection by any other person.

At page 30 of appellant's brief, it is said:

> "But even conceding the statute should be construed to impose upon the relocator the duty of proving that the statute had not been complied with, the plaintiff could have accomplished that result—conceding *arguendo* the correctness of the construction put upon the statute by the court below—by showing that the affidavit here filed was not recorded within the statutory period of time, and then resting his case. Having gone beyond the real needs of his case and introduced the whole affidavit with all of its facts for the purpose of getting the benefit of some of the language therein contained, he is certainly in no position to assert that the court should not consider the affidavit in so far as it is beneficial to the defendant company."

This argument is confuted by that portion of appellant's brief in which it is contended that the statutory requirement as to the time within which the proof must be recorded is directory only. Counsel for appellee had clearly the right as a matter of precaution to prove the insufficiency of the affidavit in as many particulars as possible.

II.

IT IS ADMITTED BY THE PLEADINGS THAT APPELLANT DID NOT RESUME WORK PRIOR TO APPELLEE'S LOCATIONS OR RELOCATIONS.

Before entering upon the discussion of where the burden of proving resumption of work rests, after the plaintiff in an adverse suit has proven the failure to do assessment work for the two calendar years preceding his location, we will invite the court to examine into the pleadings with a view to ascertaining whether the fact of resumption or non-resumption was put in issue by defendant's answer.

The concluding portion of paragraph VII of the complaint is as follows:

> "The defendant failed to do or perform or cause to be done or performed thereupon or for the benefit thereof or during or for the years 1904 and 1905 and each of said years, the annual labor and assessment work or improvements required by law in order to avoid a forfeiture thereof, and thereby and because of such failure forfeited any rights they might have had in said claims and each of them, and did not resume possession of the work upon the same at any time prior to the time of the acquirement by the plaintiff and his grantors of the premises hereabove described." (R. p. 5.)

Defendant's answer to such allegation is as follows:

> "It denies that this defendant or its grantors failed to do or performed or cause to be done or performed upon said mining claims, or for the benefit thereof, during and the years 1904 and 1905, and each of said years, the annual labor and assessment work or improvements required by law in order to avoid a forfeiture thereby, and that this defendant ever forfeited any rights it had in said claims or either thereof in any way, and denies that defendant ever failed to resume

possession upon such claim, or either thereof, or at any time when such resumption was necessary for the maintenance of its rights thereto."

It will be noted that after a denial of the allegation of failure to do the assessment work for the years 1904 and 1905, which denial is equivalent to an allegation that it had done the assessment work for such years, the defendant makes this qualified denial of the allegation with respect to resumption. The language is, to repeat the quotation, "denies that defendant ever failed to resume possession upon such claims or either thereof or at any time *when such resumption was necessary for the maintenance of its rights thereto.*"

It is provided by section 2685, subsection 47, of the Compiled Laws of New Mexico, 1897, as follows:

"Every pleading must be subscribed by the party making the same or his attorney, and when any pleading is verified, every subsequent pleading except a demurrer must be verified also."

Sub-section 67 of such section provides that:

"Every material allegation of the complaint not controversed by the answer * * * shall, for the purposes of the action, be taken as true."

Complaint and answer are both verified. The only language in the answer tending to constitute a denial of the plaintiff's allegation of non-resumption of work which is the last quoted portion thereof, is manifestly ineffective to create an issue, and for more than one reason.

In the first place, it is a conclusion of law pure and simple. It is a denial that the defendant failed to resume possession at any time when the resumption was necessary for the maintenance of its rights. The denial is thus dependent upon the legal proposition as to whether the resumption was necessary to maintain appellant's rights.

Under no circumstances could the officer of the appellant who verified the answer have been charged with perjury by reason of such denial. The statement that in its opinion it was never necessary to resume in order to maintain its rights would relieve him from all imputation of a false denial.

Furthermore, the preceding part of the paragraph, separated from the denial of the discussion only by a comma, destroys any possible effect that it might be argued to have. The appellant precedes its plea to the allegation of non-resumption by an unequivocal averment, to whose truth its president swears, that it had performed the assessment work for the years 1904 and 1905, and having thus established that it was in no wise necessary for the maintenance of its rights that it should resume possession or do any work at all upon the claims prior to the 31st of December, 1906, in order to maintain its rights thereto, it qualifies its allegation of non-resumption by adding the words "when it was necessary for the maintenance of its rights."

Had the appellant intended or wished to traverse the allegation of non-resumption it would not have been satisfied with this qualified denial, but would have added an affirmative allegation that it had in good faith done work upon the claims in 1906 prior to appellee's locations.

We submit that under all rules of pleading, plaintiff's allegation of non-resumption is not traversed, and that there was no necessity for the plaintiff to offer any evidence in support of it.

After the 9th paragraph of its answer, the defendant denies each and every allegation contained in the complaint not expressly admitted in the answer to be true.

We submit that the quoted portion of the answer is equivalent to an express admission of the allegation.

The effect of such a general denial after a categorical plea to the various allegations of the complaint is treated by us at length in a subsequent portion of our brief upon another subject.

We will content ourselves therefore at the present time with the statement that the allegations in the complaint stand admitted.

III.

APPELLANT HAD THE BURDEN OF PROVING RESUMPTION OF WORK BEFORE LOCATION BY APPELLEE.

Assuming arguendo, that the pleadings do not constitute an admission that the appellant did not resume work prior to appellee's locations and re-locations, we submit that it was unnecessary for the appellee, having established the fact that the assessment work for the years 1904 and 1905 had not been done, to offer proof that the appellant had not resumed work.

(1). It has been shown elsewhere in this brief that the failure to file an affidavit of assessment work for the year preceding appellee's locations within the time required by the statute of New Mexico, threw upon the appellant the burden of proving the performance of such work. There being no evidence at all upon the subject, the presumption created by the failure to file the affidavit became conclusive, and it stands as proven, that such work was not done.

It is now contended that the appellee must also prove non-resumption of work by the appellant before appellee's location. There was no proof at all upon the subject of such resumption, and it is appellee's contention that appellant must assume the burden of proving such resumption, in order to relieve itself of the previously accruing forfeiture.

or to show that the ground was not open to relocation on account of its failure to do the necessary work or improvements during the preceding year.

It is conceded, of course, that the failure to perform the annual work or improvements does not in itself amount to a forfeiture. The ground embraced within the claim, upon which the work is not done, simply becomes open to location, and upon re-location by a third party, the forfeiture becomes complete. But it is well settled that where the work for a given year is not done, the ground at once becomes subject to location, and upon location, the possessory right at once vests in the re-locator.

2 Lindley on Mines, Sec. 645.

Though by the mere failure of the owner to perform the work, the forfeiture has not become complete, yet it is prima facie complete, it has progressed so far as to make the ground open to relocation and to put the rights of the owner at the mercy of anyone who sees fit to relocate. The absolute right of the original locator to hold the claim is lost, and while he may revive or re-establish his right if no right of another has intervened, yet once it is shown that the ground is open to location, it would seem logical that the burden of proving that such condition no longer exists, or that the ground had again ceased to be open to location, should devolve upon the one claiming the revival or re-establishment of his original rights.

Aside from the situation created by the New Mexico statute, it is the undoubted rule that a forfeiture for failure to do the annual work must be established, and the burden is upon the one claiming it to establish it clearly and satisfactorily. But where such failure is clearly and satisfactorily shown, and the abhorrence of the law to forfeitures has been overcome by clear and satisfactory proof, no reason

is perceived why the original locator should not assume the burden of relieving himself from the effect of the proven forfeiture.

Even upon the question of failure to perform the annual work, the requirement of strict proof of such failure is not of universal application.

Proof that no work or improvements have been done *upon* the claim itself, throws upon the locator the burden of proving that work done elsewhere is for the benefit of the particular claim, and hence applies as the annual work upon such claim.

Little, Dorith & Co. vs. Arapahoe & Co., 30 Colo. 431, 71 Pac. 389;

Sherlock vs. Leighton, 9 Wyo. 297, 63 Pac., 580.

In those cases it was held that the showing that no work had been done upon the claim involved, threw upon the owner the burden of showing that some other work had answered the purpose and of escaping from the effect of the apparent forfeiture.

The logic of this doctrine would lead to the conclusion that when a prima facie case of forfeiture is made out, the burden of escaping the consequences of such prima facie showing is shifted and proof must be made by the one seeking the escape.

Ordinarily the rule is that a condition once shown is presumed to continue until the contrary appears. So when an apparent case of forfeiture and right to relocate has been established by showing that the required work has not been done on the claim, the presumption is that the prior locator has abandoned it, and the burden of overcoming the forfeiture thus presumptively shown is upon the other party.

In the earlier case of Hall vs. Kearney, 18 Colo., 505, 33 Pac. 373, the rule announced in the case above cited was laid down, and it was held that where it was shown that no work had been done on the claim in controversy, the burden was upon the owner to prove that other work answered the purpose of work upon the particular claim.

The cases cited by appellant do not touch the point. Some of them lay down the familiar and conceded rule that forfeitures are not favored and must be clearly shown, and in others that where a resumption of work is shown the claim is not forfeited. But in all of them, and in all the cases involving the right of the locator to resume work and thus defeat the forfeiture, an actual resumption was shown or the owner assumed the burden of showing such resumption, and the discussion was as to whether the acts shown amounted to a resumption in good faith.

The case of Power vs. Sla, 24 Mont. 243, 61 Pac. 468, which is apparently relied upon by the appellant, does not involve the point under consideration. The pleading which was attacked in that case simply alleged that the plaintiffs failed to perform $100 worth of work and labor on the claim, but did not allege that they had not expended $100 in improvements. As the Federal statute provides for the doing of labor or improvements on a mining claim, it was held that the answer must negative both propositions and allege that neither labor nor improvements had been done, else it was bad. It was not alleged that the plaintiff had not resumed work, nor was it held necessary so to allege, nor was the question of resumption of work at all involved. The language quoted by appellant simply had reference to the alleged defect before the court, the failure to negative the idea that improvements as well as labor had not been performed.

If the extreme position taken by the appellant be sound, the one asserting a forfeiture for failure to perform annual labor or improvements must negative every possible excuse for not doing the work or improvements. The matters which will excuse such performance are familiar, and if the views of appellant are correct, it would be necessary for the relocator to allege and prove not only the failure to perform the annual work or improvements and the non-resumption of work, but also to allege and prove that he had not by adverse possession or show of force prevented the doing of the work and to negative by pleading and proof any other excuse for not doing the work. No such rule has ever been hinted at by any court.

Providence Etc. Co. vs. Burke, 6 Ariz. 323.
Quigley vs. Gillett, 101 Cal. 462, 35 p. 1040.
Hammer vs. Garfield Etc. Co., 130 U. S. 291.
Honaker vs. Martin, 11 Mont. 91, 27 p. 397.
Beals vs. Cone, 27 Colo. 473, 62 pp. 948, 958.
Johnson vs. Young, 18 Colo. 625, 34 p. 173.
Bishop vs. Baisley, 28 Ore. 119, 41 p. 936.
Axiom M. Co. vs. White, 10 S. D. 198, 72 N. W. 462.
McCullough vs. Murphy, 125 F. 150.
Callaghan vs. James, 141 Cal. 291, 74 p. 853.
Sherlock vs. Leighton, 9 Wyo. 297, 63 p. 581.

(2). "To resume work" means to re-enter upon the ground in good faith, and to prosecute the work with reasonable diligence to completion.

McCormick vs. Baldwin, 105 Cal., 284, 37 Pac., 903;
Honaker vs. Martin, 11 Mont., 91, 27 Pac. 397.
Lindley on Mines (2nd Ed.), section 654, 27 Cyc. 595.
Jordan vs. Duke, 6 Ariz. 55, 53 p. 197.
Honaker vs. Martin, 11 Mont. 91, 27 p. 397.
Hirschler vs. McKendricks, 16 Mont. 211, 40 p. 290.

The presumption is conclusive in this case that the appellant did not do $100 worth of work on either claim in any year between 1901 and 1906 inclusive. Therefore, if a presumption is indulged in its favor that it resumed in 1904, and again in 1905, it must be held that it did not complete the work of resumption in either year, which shows lack of diligence and good faith and that the work was not prosecuted to completion. This is conclusive as to the locations of the "Lulu" and the "Agnes" in April, 1905.

(3). Counsel for appellant illustrate the vitality of an original location of a mining claim by dividing the varying conditions into three groups.

The third group is as follows: (A being the origianl locator, and B the re-locator.)

"A fails to do the annual assessment work. B re-locates after the year expires, but abandons his relocation or otherwise defaults. A then resumes assessment work. C thereafter makes a second re-location. A prevails over C."

We do not find any special materiality in this proposition, but are loath to believe that it correctly states the law.

When B relocated after A had failed to do the annual assessment work and prior to resumption by A, B became vested with an absolute possessory right and with an inchoate right which nothing but his own failure to comply with the congressional requirements could prevent from ripening by patent into a legal title. Such right thus vested in B, it seems to us, is fundamentally inconsistent with any right whatever in anybody else except the reversionary right of the United States. The forfeiture is complete. While B was relocating the ground, it was to use the language of the statute, "open to relocation in the same manner as if no location of the same had ever been made." The fact of B's relocation made the conditions such as if A's location had never been made.

We have examined with interest the two cases cited in appellant's brief in support of this proposition. There is language in both sufficient to support an argument in favor of the proposition. But we question very much whether either of them is authority for it.

In Justice Mining Co. vs. Barclay, 82 Fed. 554, one Cummings, complainant's grantor, was the original locator. There was question as to whether he had done the assessment work prior to 1895. Several re-locations had been made by others prior to 1895, but had been abandoned. The complainant had done the assessment work subsequent to that year. The respondents located in 1896. One of their contentions was that the re-locations prior to 1895 had had the effect of forfeiting complainant's locaion. It is apparent, therefore, that respondents' location in 1896 was necessarily invalid if these alleged intervening locations had been valid. The court says that the complainant never abandoned the property, and indicates its belief that the complainant, or its grantor, had performed the annual assessment work at all times. The opinion then proceeds:

> "Conceding for the purpose of this opinion that complainant had failed to do any assessment work upon the ground and that it was prior to January 1, 1895, subject to be re-located, still the respondents are not in a position to take any advantage of such failure on the part of the complainant to do the assessment work." * *
>
> "The assessment work by complainant in 1895 prior to the relocation of the ground by Hills on behalf of the respondents *and before any intervening rights by other parties had been acquired* revived its rights under the Cummings location." (Italics ours.) And referring again to the locations which it was contended divested Cummings, the court says:
>
> *"If either of said location were valid*, the respondents would have no standing in court." (Italics ours.)

We conclude therefore,

First, That the language of the court's opinion does not sustain the proposition suggested by counsel for appellant; and

Second, That if it be construed to sustain it, it would be purely dictum.

Klopenstine vs. Hays, 20 Utah 45, 57 Pac. 712, being the other case cited in appellant's brief is, so far as this point is concerned, also dictum.

The facts found in that case were as follows:

The plaintiff claimed under the Jupiter claim located in 1881. The annual assessment work was not done for the year 1882; in 1883 the Juniper claim was attempted to be re-located. No work was done upon it between 1885 and 1892.

Work was resumed upon the Jupiter claim in 1885, and the annual assessment work was done continuously after said date. It was claimed by the defendant that the forfeiture of the Jupiter claim was consummated when the Juniper claim was located in 1883 and that the annual assessment work done upon such Jupiter claim from 1885 to 1897 was ineffective to revive such forfeited location.

If the location of the Juniper claim had been valid, then the question suggested in the proposition under discussion would have been squarely presented for decision; but the court holds expressly that the location of the Juniper claim was invalid. This holding was sufficient to dispose of the case. The court then does use language tending to support appellant's proposition upon the sole authority of *Mining Company against Barclay, supra*, from the opinion of which case it purports to quote.

It will be noted, however, that the quotation is not from the opinion in the Barclay case, but from the syllabus, and a reading of the opinion, as we have seen, shows a wide difference between it and the law as stated in the syllabus. To repeat, the cases are not authority for the proposition; and if they are they do not correctly state the law and should be overruled.

(4). The last clause in section 2324 of the Revised Statutes "provided that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after failure and before such location," manifestly constitute a proviso in the nature of an exception to the terms of the preceding and principal clause of the Act."

The section first sets forth the conditions essential to the maintenance of the possessory right of the locator. It then provides that "upon a failure to comply with these conditions" the ground shall be open to relocation, thus completing the enactment. Then follows the last clause, thus, as we have said, plainly constituting an exception to the proviso.

We concur in the statement of the Supreme Court of Alabama, quoted on page 35 of appellant's brief, that it does not necessarily follow that a legislature by using the term "provided" intends that which succeeded it to be a proviso or an exception.

The matter of the succeeding words may indicate a contrary legislative intent, or such contrary intent may be found in other portions of the statute.

The ordinary meaning of the word, however, if uncontrolled by any special language or circumstance, implies that that which follows it is a proviso, and, as held by this court, "the general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute."

Georgia Banking Co. vs. Smith, 128 U. S. 174, at p. 181.

The cases of Austin vs. United States, 156 U. S., 417, and Selma, Etc. R. R. vs. United States, 139 U. S., 560, cited in appellant's brief, are, it seems to us, authority for our contention.

In the Austin case the statute was that the claims of the successors in interest of Austin should be referred to the court of claims for adjudication, "provided, however, that it be shown to the satisfaction of the court that neither Sterling T. Austin, Sr., nor any of his surviving representatives gave any aid or comfort to the late rebellion but were throughout the war loyal to the government of the United States."

The court held that such proviso "made loyalty a jurisdictional fact, since the consent to the prosecution of the suit was given upon the condition that that fact should be established."

It seems to us that the language could not bear any other construction. The court of claims would look to the act for its jurisdiction, and find itself confronted at the threshold of the inquiry with the enactment that the claim is only referred to it provided Austin's loyalty be shown to its satisfaction.

In the Selma Railroad case the act appropriated $375,000 to pay to mail contractors for mail services performed in certain Southern States before the war, "provided that any such claims which have been paid by the Confederate States government shall not again be paid." The court refers to the Confederate enactment of September 27, 1862, directing certain moneys collected from the postal service to be paid to loyal citizens of the Confederate

States, and says that it is not disputed "that the claim here in suit is of the class for the payment of which the Confederate enactment of 1862 made provision."

Then passing upon the contention made by the claimant, that it was the duty of the United States to show affirmatively that the claim was paid by the Confederate States government, the court says:

> "We are of opinion that Congress intended to provide for the payment of only such claims as appeared not to have been paid by the Confederate government. As the claims described in that Act had been, at the date of its passage, outlawed by limitation or by express enactment forbidding their payment, and as Congress must be presumed to have passed that Act with knowledge of the Confederate legislation of 1861 and 1862, we can not believe that it was intended to impose upon the United States the burden of showing, affirmatively, that such claims had been paid by the Confederate government. The object of the proviso 'that any such claims which have been paid by the Confederate states government shall not again be paid,' was to indicate the class of cases which the Act embraced. * * * *
>
> "The Act of 1877, was, in effect, an invitation to all having claims of the class described in it, which had not been paid by the Confederate States, to present them for payment out of the sum appropriated by it for that purpose; leaving those seeking the benefit of the Act to show that their claims were of that class. Besides, as the fact of payment or nonpayment by the Confederate government was peculiarly within the knowledge of the claimant or within his power—if in the power of anyone—to establish, it may well be supposed that Congress intended that a claimant, as a condition of payment by the United States, should show that his demand belonged to the class for which the Act of 1877 provided."

It is apparent that the court in such case construed the word "provided" in other than its ordinary sense, for the

reason that it found in the statute a clear intent on the part of Congress which necessitated such construction.

As in that case the fact of payment or nonpayment by the Confederate government was peculiarly within the knowledge of the claimant or within his power, if in the power of anyone to establish, so in this case the knowledge of whether or not the appellant had resumed work was peculiarly within the knowledge of the appellant, and within its power, if in the power of anyone to establish.

Counsel argue at page 45 of their brief that knowledge of resumption or non-resumption of work is readily accessible to the re-locator. Of course, such knowledge is in a sense accessible to the re-locator; but it is not so accessible to him as to the one who actually did resume the work; and the power to establish non-resumption is undoubtedly much more difficult than the power to establish resumption.

It is always difficult to prove a negative. It is especially difficult to negative resumption of work. A re-locater frequently finds it difficult to establish that the annual assessment work has not been done; but at least in assuming this burden he can ascertain by an inspection of the claim what work has been done, and can procure testimony as to its value. Resumption of work, however, as contemplated by the statute, does not call for any quantity of work at all; if five minutes before the re-locator completes the monumenting of his claim, a single man on the other side of the hill and beyond the view of the relocator on behalf of the original locator strikes a pick into the vein with the honest intention of resuming work, such resumption suffices to invalidate the re-location.

It can not be that it was the intention of Congress to impose such a burden upon a re-locator when the evidence of such resumption is peculiarly within the control of the person whose duty it is to do the work.

We have heretofore seen that the resumption of work after failure to do the annual assessment work, in order to be effective to prevent a valid re-location, must be in good faith. If, therefore, the re-locator has the burden of proving non-resumption of work, he also has the burden of proving that the work was not resumed in good faith. It would be virtually impossible for him successfully to assume such a burden, and we can not believe that such was the intent of the statute.

We will close the discussion of this topic with the following very apt quotation from the opinion of the Supreme Court of New Mexico:

> "If appellant had in fact resumed work before the date of appellee's locations it could easily have shown it and it was its duty to show it. The claims in this case each covered more than one hundred acres of land. The law required one hundred dollars' worth of work. From this fact it will be seen that impossibility of clear and convincing proof by appellee that appellants had not resumed work on some part of these claims and had not performed one hundred dollars' worth of work."

(5). The New Mexico statute shifting the burden of proof does relate to the resumption of assessment work.

The Supreme Court of New Mexico says in its opinion

> "When the burden by non-compliance with the statute was placed upon the appellant, it could have been shifted or met by proof either of the annual labor done at the proper time or work done before the location of appellee, but the proviso to the statute calls for an affirmative showing by the locator."

We submit that the Territorial Supreme Court in this portion of its opinion construed the statute as covering resumption work, and if so, then, under the general rule of this court, such construction will prevail.

IV.

THE FINAL RECEIPT ISSUED TO APPELLANT IN THE LIGHT OF THE SUBSEQUENT ADJUDICATION REJECTING APPELLANT'S APPLICATION FOR PATENT AND CANCELING SUCH FINAL RECEIPT WAS INEFFECTIVE TO SEGREGATE THE LANDS FROM THE PUBLIC DOMAIN PENDING THE ADJUDICATION AS TO ITS VALIDITY, AND THIS WITHOUT RESPECT TO WHETHER SUCH FINAL RECEIPT WAS VOID AB INITIO OR ONLY VOIDABLE.

The converse of this proposition is argued with much elaboration by counsel for appellant. In our opinion, the authorities cited by him are inapplicable, for the reason that they refer to the laws and the practice for the acquisition of agricultural territory exclusively. A mass of authority is adduced to the effect that land embraced in a homestead entry is segregated from the public domain until such entry is canceled upon the books of the local land office, and it is assumed that the effect of a mineral entry is the same. No authority is cited bearing upon the effect of a mineral entry except the two cases of Murray vs. Polglase, and Adams vs. Polglase, both of which are directly against counsel's contention.

We respectfully submit that there is a clear distinction between the effect of mineral and non-mineral entries, and that such distinction is based upon the fundamental difference in the respective laws for the acquisition of mineral and agricultural territory.

Rights to agricultural territory are initiated in the local land offices; whereas, rights to mineral territory are initiated by the posting of monuments and doing work upon the territory sought to be acquired.

It is to some extent correct as suggested in appellant's brief, that under special circumstances a settler may initiate a title to agricultural lands without applying to the local land office. This court has so held when strong equities prevailed, and, as stated in Ard vs. Brandon, 211 U. S., from its inclination to deal "tenderly with one who in good faith goes upon the public lands with a view of making a home thereon." But these special circumstances, like all exceptions, only emphasize the rule and the distinction. Rights to mineral territory may never be initiated in the local land office. Rights to agricultural territory may always be initiated in the local land office, sometimes perhaps and under exceptional circumstances elsewhere. The strength of the reasoning of the Supreme Court of New Mexico to which counsel for appellant take exception, is substantially unimpaired.

The procedure in acquiring property, the right to which is initiated by filing the application in the local land office, has developed into a necessary set of rules, which have been recognized by the courts, and thus become the established law.

One of these rules is that land upon which entry has been made in the land office, is segregated from the public domain until such entry has been canceled upon the plats of the land office.

This rule has neither application nor relevancy to mineral entries.

There is no such thing as the segregation of mineral land from the public domain by consequence of the filing of an application for a patent.

The test of whether mineral territory has been segregated from the public domain, or in other words, has ceased

to be open to location, is found in the inquiry as to whether an interest in it has vested in anybody else.

As stated by the Secretary of the Interior in the American Hill Quartz mine case, quoted with approval by this court in the case of Benson M. & S. Co. vs. Alta M. & S. Co., 145 U. S., 36 Law Ed. p. 763.

> "At the outset it is proper to remark that by the mining laws of the United States, three distinct classes of titles are created, viz: 1. Title in fee simple. 2. Title by possession. 3. The complete equitable title. The first vests in the grantee of the government an indefeasible title, while the second vested a title in the nature of an easement only. The first, being an absolute grant by purchase and patent without condition, is not defeasible, while the second, being a mere right of possession and enjoyment of profits without purchase and upon condition may be defeated at any time by the failure of the party in possession to comply with the condition, viz, to perform the labor or make the annual improvements required by the statute. The equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued."

At the time of the location by appellee, appellant manifestly did not have a title in fee simple, because no patent had been issued. Nor did it have a title by possession, because it had not done the required assessment work. It therefore had no interest in the premises unless it had "a complete equitable title."

We submit that the record in this case is conclusive that the appellant did not have an equitable title; the most that it can be said to have had was a claim to an equitable title, which claim, as it evidenced by the subsequent proceedings before the Commissioner of the Land Office, turned out to be unfounded.

The decision of the Secretary did not divest the appellant of the equitable title which it claimed. It was an adjudication that it never had an equitable title, and that without respect to whether the defects in the application for a patent were void or voidable, jurisdictional or otherwise.

Here was certain territory belonging to the public domain, the legal title to which was in the United States. The appellee located it. The appellant claimed an interest in it as against the United States. If such claim had been established by the appellant, then necessarily appellee's location would have been junior and ineffective. The validity of appellee's location depended, not upon whether or not the appellant *was claiming* an interest against the United States, but upon whether or not, in fact, appellant *had* an interest in the property as against the United States. The rejection of appellant's application for a patent, in which it acquiesced by waiving its right to review the decision of the Secretary and relocating the territory, is conclusive as between the appellant and the United States that the appellant had acquired no interest in the territory by virtue of its application for patent and final receipt. Appellant might, when the Commissioner of the Land Office questioned its right to a patent, have resumed its assessment work, and maintained its possessory title. It failed to do this, and, therefore, when its claim to an equitable title was ascertained by final adjudication to have been unfounded, it was left without any title, either equitable or possessory.

In the absence of legal authority, or established rule of practice, it certainly will be conceded that as a general proposition appellee's location would be valid if at the time of location appellant had no interest in the territory, even though the adjudication finally resolving the question as to whether appellant had such an interest of not, should not have been made until long after appellee's location.

The burden therefore rests upon appellant to show that it is the law that even if appellant had no interest in the territory, it was, nevertheless, for some reason, so segregated from the public domain as not to be open to location at the time appellee located it. This burden counsel for appellant assume; and undertake to establish that it is the law that an entry made in pursuance of an application for a patent to a mining claim, even if such entry should be subsequently declared invalid, segregates the land from the public domain pending such adjudication; and in support of their contention, they cite a vast mass of decisions upon the effect of homestead entries.

As has been said, the law with respect to the acquisition of mineral territory is entirely different from that with respect to the acquisition of agricultural territory. The conditions for the acquisition of the two characters of territory and the public policy with respect thereto are different.

Referring to the law as to homestead entries, Judge Sanborn stated in his opinion, in the case of Germania Iron Company against James, 89 Fed. 811, at p. 814, as follows:

> "The rule and practice which the bill alleges that the Land Department has established was reasonable and just. It was that, after a decision of the Secretary had been rendered that a former entry was void and should be canceled, no subsequent entry of the land could be made until that decision was officially communicated to the local land officers, and a notation of the cancellation was made on their plats and records. The Secretary of the Interior is an appellate tribunal in these cases, whose court is held, and whose decisions are filed, more than 1,000 miles from most of the inferior tribunals in which the parties appear and institute and try their contests. It is according to the almost universal practice of judicial tribunals for the inferior court to take no action, and to allow none to be taken in it, until the decision and order of the ap-

pellate court has been officially received and recorded. The reasons for such a rule in the Land Department are far stronger and more imperative than in the ordinary courts of law or equity. It is in the local land office that the rights of the entrymen must be initiated as well as contested. The policy of the government is to afford to the actual settlers, to the preemptors and homesteaders, to those who live on or near the public land to be disposed of, every facility to acquire it without burdensome expense or unnecessary trouble. The very existence of the local land offices is the outgrowth of the purpose of congress to carry to the residents of the districts in which the lands are situated, not only the tribunals in which they may initiate and try their rights to obtain portions of the public domain, but all the information to enable them to intelligently prefer and establish their claims. To this end, the surveyor of each district is required to transmit to the registers and receivers of the local land offices general and particular plats of all lands surveyed in their respective districts, and these registers and receivers are required to keep a record of all entries and cancellations on these plats and in their books, so that any applicant for land may there learn when it is open for entry. To this end these plats and records in the local land office are declared to be open to public inspection, and the register and receiver are charged with the duty of giving correct information regarding them to every inquiring applicant. To this end, applicants to enter the public land may not make their entries or institute their proceedings to obtain them in the general land office of the district in which the lands are situated."

This opinion was rendered reversing a judgment sanctioning a demurrer. It was alleged in the complaint that it was the rule and practice of the Land Department that no entry could be made upon lands covered by a prior entry until such prior entry should have been canceled upon the books of the local land office. It was this allegation which

saved the complaint as against demurrer. The defendant in such case thereafter interposed an answer denying the allegation in the complaint that such a rule existed in the Land Office. Upon trial, judgment was rendered in favor of plaintiff. Upon appeal the judgment was affirmed. 107 Fed., p. 597.

At page 604, the court re-affirms the reasons stated in its opinion upon the demurrer.

Referring to the alleged rule of the Land Department that no interest could be acquired in land covered by a prior entry until such entry should have been, not only declared invalid, but marked canceled upon the books of the local land office, the court reviews with elaboration the decisions and rules of the Land Department and concludes that such rule did exist. The existence of such rule is the foundation of the various adjudications by the courts that land upon which an entry exists is segregated from the public domain until such entry shall have been marked canceled.

We respectfully insist that no such rule has ever existed in the Land Department with respect to mineral entries, and that there is not a single case in the decisions either of the Land Department or of any court, to the effect that a mineral entry segregates the land pending an adjudication as to its invalidity, except Batterton vs. Douglas Mining Company (Utah) 120, Pacific 827, decided at about the same time as the instant case was decided by the Supreme Court of New Mexico.

One seeking title to mineral land initiates his title by monumenting his claim upon the ground. If he prefer to comply with the conditions essential to a possessory title he need never make any application to the Land Office and need never pay the United States a dollar, even though the territory be of the utmost value. His notice of location is

recorded, not in the Land Office, but in the accordance with state or territorial laws, in the designated county office. Others desiring to acquire title to the same territory receive their notice to his claim to it, not from the records of the land office, but from the monuments upon the ground and from the records in the county offices. If he should in course of time decide to change his possessory title into a fee simple, he applies for a patent; if another party claims the territory, the Land Office is not the tribunal before which their conflicting claims are litigated, as would be the case with homestead entries; for, by provision of congress, the moment the adverse is filed, the questions in dispute are held in abeyance by the Interior Department until adjudicated by the local courts.

As has been heretofore stated, the burden of establishing that there is rule or law whereby a mineral entry has the peculiar effect, without respect to its own validity, of segregating the land from the public domain, is upon the appellant, and even if there were no direct authority against appellant's contention, we would insist in the absence of authority, and in view of the obvious distinction between mineral entries and non-mineral entries, and of the fact that a rule of the department does prevail with respect to non-mineral entries, that it had not assumed the burden.

We respectfully submit, however, that the distinction between mineral and non-mineral entries is recognized by the courts and that what decisions there are upon the question, are to the effect that a mineral entry does not segregate the land from the public domain.

BROWN vs. GURNEY, 201 U. S. 184, 50 L. Ed. 717.

The above case is cited in appellant's brief. To us, it establishes conclusively the distinction between the effect of mineral and of agricultural entries.

In Brown vs. Gurney, it appeared that the Kohnyo claim had been located. The Mt. Rosa placer claim, wedge-like, cut the Kohnyo claim about the middle. The owner of the Kohnyo claim applied for patent, and the department held that by reason of its north and south ends not being contiguous, the entire claim could not be patented. The chief values appeared to be upon the north end of the claim and the department's decision, apparently recognizing this fact, was that the claimant might elect whether to retain the north or the south end of the claim; and that if he should fail within sixty days to make any election, he should be deemed to have elected the north end.

The claimant at once instituted proceedings to contest the right of the owner of the Mt. Rosa claim to the strip of territory dividing the north from the south ends of the Kohnyo claim. Obviously his success in this contention would have made the Kohnyo claim continuous and he would have been able to patent the entire claim. After some two years this contest was decided against the claimant. The sixty days' time given to him to make his election between the north and south ends was held to have been suspended during his contest with respect to the Mt. Rosa territory.

The owner of the Kohnyo claim still had the right to elect to retain either end. His interest, therefore, prior to such election, was a vested contingent interest, in both ends. His interest in each end was contingent upon whether or not he should take it or the other end, but though contingent, it was, nevertheless, a vested interest; and therefore, it was this vested interest of the claimant of the Kohnyo claim and not his patent entry which segregated the entire claim from the public domain during the existence of such vested contingent interest.

In the meantime, and prior to the exercise of such election, one Brown located the south end of the Kohnyo claim. Then the owner of the Kohnyo exercised his election by filing it with the Commissioner of the Land Office at Washington. By such act, he abandoned his contingent interest to the south end, and his interest in the north end was changed from a contingent to an absolute interest. Upon the filing of such election, Gurney located the south end. Subsequently the Commissioner of the Land Office transmitted the election of the Kohnyo claimant to the local land office, which office thereupon canceled upon its books the claimant's original entry. Whereupon, one Small located the south end.

It was determined by this court that Gurney, who was the first person to locate the south end after the filing of the election, had a right prior to that of the other two parties, one of whom, as stated, had located prior to the election by the Kohnyo claimant, and the other subsequent to the cancellation of the entry upon the records of the land office.

It seems impossible to conceive a case which so comprehensively disposes of the issues involved in the proposition now under consideration.

Brown who located the south end prior to the election acquired no right, not as argued by counsel for appellant, because the entry of the Kohnyo claimant segregated the land from the public domain, but because, as has been stated, the Kohnyo claimant still had a contingent interest in both ends of such claim.

If the rule applicable to homestead entries had application to mineral entries, as argued by counsel for appellant, then Small, who did not locate until after the cancellation of the entry, would have had title to the premises, for it is

undisputed law, as evidenced by the opinions of Judge Sanborn, supra, that the right to acquire territory covered by a prior homestead entry only accrues after, not the adjudication declaring the prior entry invalid, but the cancellation of the same upon the books of the local land office. If the same rule, as argued by counsel for appellant, applied to mineral entries, then Gurney's location of territory prior to the cancellation of the entry upon the books of the local land office, would have been invalid; but the court held that it was valid, thereby conclusively defining the distinction for which we contend. In other words, the court in seeking a determination of the validity of the three locations, looked not at all at the entries upon the books of the Interior Department, but solely to the ascertainment of whether or not at the time Gurney located, anyone else had an interest in the territory. It found that when Brown located, the Kohnyo claimant still had his contingent interest, and it thereby passed Brown's location as invalid. Chronologically it came next to the election by the Kohnyo claimant. It did not stop to inquire as to whether the entry had been canceled on the books of the local land office, but passed on until it came to Gurney's location; and upon finding it to be the first location after the extinguishment of the Kohnyo claimant's contingent interest, pronounced it valid without respect to what the local land office had or had not done.

MURRAY vs. POLGLASE, 17 Mon. 455; 43 Pac., 505;

ADAMS vs. POLGLASE, 23 Mon. 401; 59 Pac., page 439.

The above decisions are conclusive against appellant's contention.

On September 17, 1892, Polglase and others made application for patent upon the Ramsdell mining claim. Mur-

ray and others filed an adverse and brought an adverse claim suit similar to the one at bar. The plaintiffs based their claim upon a prior location named "Maud S." It appeared that the assessment work upon the Maud S. had not been done for the years 1887 and 1888; that on December 29, 1887, plaintiffs made entry in the United States Land Office for such claim and obtained the receiver's receipt for it; that the Ramsdell location was made on January 1, 1888.

Upon the trial the plaintiffs introduced in evidence the location notice of the Maud S. claim and the receiver's receipt, and rested.

It appeared by the admissions of the pleadings that the plaintiffs had failed to do the assessment work for the years 1887 and 1888. The defendants offered the decision of the Register and Receiver of the United States Land Office canceling the Receiver's receipt and the decision of the Commissioner of the General Land Office and of the Secretary of the Interior affirming the decision of Register and Receiver. These documents were excluded by the court and judgment was entered upon an instructed verdict in favor of the plaintiffs. From this judgment the defendants appealed.

It appears that the Receiver's receipt given on the 27th of December, 1887, was outstanding, uncanceled, on the first of January, 1888, when the Ramsdell claim was located. If so, and such receipt had the effect claimed by counsel for plaintiffs in such case, of segregating the territory from the public domain, then the Ramsdell location was void, even as in this case appellant contends that appellee's locations of May, 1906, were void; and in such event the decisions subsequently rendered canceling such entry and receipt would have been immaterial, and the ruling of the court excluding them, and the consequent judgment have been proper.

The Supreme Court of Montana, however, reversed the judgment, saying:

> "These documents were material to defendant's case. Plaintiffs had proved a receiver's receipt for the land in controversy. To avoid this result, it was material to defendants to show that this receiver's receipt did not exist, and that it, with its force and power, had been destroyed by the cancellation of the same by the officers of the land department having jurisdiction over that subject. For these reasons the judgment of the district court will be reversed and a new trial ordered."

Murray vs. Polglase, 17 Mont. 455, 43 Pac. 505, at page 508.

The inevitable conclusion from this judgment is that the validity of the Ramsdell location depended not upon whether the entry was uncanceled, and its validity undetermined at the time of such location, but upon whether such entry, though subsisting at the time of such location, was by subsequent decision ascertained to be valid or invalid.

Upon the new trial thus ordered, Adams and others intervened, claiming the ground in controversy as against both plaintiffs and defendants, under a location made by them on January 31, 1894, as the "Adverse lode mining claim." The interveners claimed that the plaintiffs had lost whatever right they had acquired under the Maud S. location by their failure to do the assessment work, and that the defendants' location was invalid because the receiver's receipt outstanding in the hands of the plaintiffs on January 1, 1888, the date of the defendants' location of the Ramsdell claim, had withdrawn the land from the public domain, and that it was not open to location by anyone at such time, and that, therefore, the defendants acquired no right to it by virtue of the Ramsdell location.

It is manifest that this is the precise contention of the appellants upon this appeal. The lower court ruled in effect that the location of the Ramsdell claim by defendants was for such reason invalid, and judgment was rendered in favor of the interveners.

The Supreme Court reversed the judgment, saying:

> " * * the real question to be determined is, who is entitled to the patent from the United States government to the mining claim in controversy, or, in other words, who has become the purchaser of the mining claim, and divested the title of the government thereto, by complying with the requirements of the law of congress relative to acquiring title to mineral lands. * * (p. 441).
>
> The cancellation of plaintiffs' receipt adjudicated the fact that they obtained no title at all by their entry. By this judgment of the authorities of the land office they were deprived of the ability to claim any rights under it. They were left with just such rights as they had at the time they obtained it. If they chose to rely upon it as evidence of their title, and then forebore to preserve their rights by doing the acts necessary to preserve them, they are not now in a position to assert that they have lost nothing. They stand in the same position as they would have stood on January 1, 1888, if they had not obtained the receipt at all. They can not be heard to say that during the time the receipt was outstanding the land was withdrawn from the mass of public lands and that defendants acquired no rights under their location. Plaintiffs' rights were forfeited and the Maud S. claim was subject to relocation, at the time the Ramsdell claim was located." (p. 444.)

Murray vs. Polglase, 23 Mont. 401, 59 Pac. 439, at pp. 441-444.

The subject matter of this litigation was also twice before the Land Department.

On the 5th of March, 1904, in Adams vs. Polglase, 32 Land Decisions, p. 477, the Honorable Secretary Hitchcock, renders his opinion as follows:

> "The Maud S. was canceled by the land department as the result of the proceedings had on the protest filed by the Ramsdell lode claimants, on the ground that an expenditure of the value of $500 in labor or improvements had never been made upon or for the benefit of the Maud S. claim, as required by section 2325 of the Revised Statutes. Compliance with this requirement of the statute prior to the expiration of the period of publication is an indispensable prerequisite to entry and patent, and without such compliance there can be no valid entry. It may be conceded, however, that while the Maud S. entry stood uncanceled of record, the lands covered thereby were not properly subject to location. But when that entry was canceled, the lands from such date became subject to location, and the prior location by the Ramsdell lode claimants became from such time effective, if rights thereunder were then being, and were thereafter asserted according to the mining law."

The Honorable Secretary cited in support of the quoted portion of his opinion the case of Noonan vs. Caledonia Gold Mining Company, 121 U. S. 393.

Adams moved for a rehearing, and urged in support of his motion that the last mentioned case as construed in the later case of Kendall vs. San Juan Mining Company, 144 U. S. 658, was not authority upon the point for which it was cited by the Secretary. The Secretary, however, denied the motion for review, declaring that there is a

> " * * long established ruling of the Department, in cases similar to the present one, to the effect that mining locations or entries under the public land laws, made upon lands not at the time regularly subject thereto, may nevertheless, if maintained in good faith, and the land subsequently becomes subject to such location or entry, be permitted to remain intact, as having

attached on such date, if at that time there be no adverse claim. (See Roy Roy Lode, 1 Brainard, 173; Dobbs Placer Mine, 1 L. D. 565, 568; Gunnison Crystal Mining Co., 2 L. D. 722, 724-5; Meyer et al vs. Hyman, 7 L. D. 336; Moss Rose Lode, 11 L. D., 120; Colomokas Gold Mining Co., 28 L. D. 172, 174.)

"There being no claim to the land here involved adverse to that of the Ramsdell lode claimants at the date of the cancellation of the Maud S. entry, the Department is of the opinion that the holding in the cases cited is clearly applicable in the present case."

The conclusion of the Secretary was undoubtedly correct, but we question whether the language employed by him was in harmony with the philosophy of mining law. We refer to that portion of the above quoted opinion in which he says:

"It should be conceded, however, that while the Maud S. entry stood uncanceled of record, the lands covered thereby were not properly subject to location. But when that entry was canceled, the lands from such date became subject to location and the prior location by the Ramsdell lode claimants became from such time effective."

Such was the practical legal effect of the several transactions.

It would seem to us that the more appropriate expression would have been that, while the Maud S. entry stood uncanceled of record, it was unascertained whether the lands covered thereby were properly subject to location, and the question of whether or not they were at the time of the location subject to location would not be answered until the decision of the Land Office should be rendered; and, therefore, that when by the cancellation of the entry it was judicially ascertained that such entry was ineffective to establish an equitable title, then it became ascertained that the

lands had been open to location at the time of the location, and that the location had been always valid and effective.

We have here two express rulings by the Land Department, that a mineral entry does not segregate the land from the public domain, as does an entry upon agricultural land. As we have seen from the decision of Judge Sanborn in the Germania case, the doctrine of segregation by reason of an uncanceled entry even though invalid is based primarily upon a rule of the Land Department. It will not be claimed by counsel for appellant that there is a rule in express terms to the effect that a mineral entry though invalid, segregates the land until it be canceled or adjudged invalid. Certainly it can not be successfully argued that such a rule as to mineral entries should be inferred from the fact of there being such a rule as to agricultural entries, in the face of this holding by the Secretary, that there is a long established rule of the department to the contrary.

THE RULE THAT INVALID AGRICULTURAL ENTRIES SEGREGATE THE LAND UNTIL CANCELLATION IS NOT INCONSISTENT WITH THE PRINCIPLE THAT THE FACT OF SEGREGATION DEPENDS FUNDAMENTALLY UPON THE FACT OF AN INTEREST IN THE PROPERTY EXISTING IN A THIRD PARTY.

In addition to the distinctions heretofore alluded to between the respective procedures for the acquisition of mineral and agricultural lands, there is one to which attention has not yet been called.

By section 2, Chapter 89 (21 Stat. at Large, 141), U. S. Compiled Statutes, 1901, page 1392, it is provided:

> "Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancelation of any pre-emption homestead, or timber cul-

ture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands."

The inevitable effect of this section is to segregate from the public domain lands covered by the homestead entry, however fraudulent or void it may be.

This court held in the case of Hodges vs. Colcord, 193 U. S., 192, 48 Lawyers' Ed. 677, that the right of entry given by this section inures to the benefit of a contestant who procures the cancellation of an entry even though the same be void. The logical effect, therefore, of this statute is that the very act of congress which constitutes the general grant to all entrymen, obligates the government immediately upon the filing of an entry, even though it be a void one, to withhold the land, not for the benefit of the entryman if his entry should be ascertained to have been invalid or fraudulent or void, but for the benefit of the person, if any, who apprises the government of the invalidity. It is a matter of public policy, and discourages fraud by offering reward to him who prevents it.

In other words, just as in the case of Brown vs. Gurney, the Kohnyo claimant had a contingent interest in both ends of the claim until by electing one end, he abandoned the other. So in the act of congress, the instant a homestead entry is in fact filed, a contingent beneficial interest is created in favor of a person as yet unascertained.

During the progress of the proceedings prior to the issue of the patent, anyone under the law may institute a contest, and such contestant forthwith is vested with an interest in the land, contingent upon the success of his contest and his filing upon the land himself within thirty days after the notice of cancellation. By reason of this statute the government has not the power to sell the land until

thirty days after the cancellation of the prior entry; and therefore, as a necessary corrollary, no one has a right, prior to the expiration of such thirty days after cancellation, to initiate a right upon it, for the initiation of a right by an individual necessarily depends upon the right of the government to sell.

We therefore, conclude this branch of the subject by repeating that the only logical test, and the proper test of the right of anyone to enter land which belongs to the government and which by act of congress is thrown open to all of our citizens, is whether or not any other person has a valid prior interest, absolute or contingent, in the land. If no such interest in fact exists, then the land is open to location, the right depending upon the fact of whether such interest in a third party exists, and not upon whether such fact may or may not have been judicially ascertained at the time of location.

PATENT PROCEEDINGS ONLY DISPENSE WITH NECESSITY FOR ANNUAL LABOR IN THE EVENT THAT THEY RESULT IN PATENT.

We do not believe it necessary that appellee should establish that appellant's entry was void ab initio. If our reasoning be sound, then it suffices that such entry was voidable, if as a matter of fact it was ascertained by subsequent adjudication to be invalid. Courts do not make law, they determine it. They declare legal relations as they existed at the time of the happening of the transactions, to which the law is subsequently applied. When the appellee made his five locations, it was not ascertained whether they were valid or not. Their validity was dependent upon whether or not appellant's application should be sustained. If it should be sustained, appellant then, by virtue of such application, was relieved from its duty to do assessment

work. If not sustained, then its interest in the premises lapsed by reason of its failure to do assessment work prior to appellee's location of the five claims. As stated by the Court in the Polglase case above quoted

> "If they chose to rely upon it (the receiver's receipt) as evidence of their title, and then forebore to preserve their rights by doing the acts necessary to preserve them, they are not now in a position to assert that they have lost anything."

This question is so philosophically treated by Costigan in his work on mining law, that we quote from Section 85, page 286 of that book, as follows:

> "After a patent actually issues no work need be done, of course; but will anything short of patent excuse? It seems perfectly clear that after entry in the land office—that is, after the patent proceedings have passed the point where the contract of purchase is complete by the payment of the money for the land by the applicant—the applicant need perform no more actual labor if patent ultimately issues to him, or, more accurately, if the entry is not canceled by the land department. The reason is that in such case all proceedings in the land department after entry are immaterial, and the receiver's receipt makes the applicant the equitable, and for all practical purpose the actual, patentee. But the "if" above noted causes the trouble. *If for any reason* the receiver's receipt is canceled by the land department the applicant finds himself governed *by the general rule that until entry the annual labor must be kept up*, and may therefore find himself without a claim because some third person relocates it on account of the failure to keep up the annual labor." * * The only wise course is to perform the annual labor, not only until the receiver's receipt is issued, but also, for fear of protest on the ground of laches or fraud, to perform that labor until patent actually issues."

V.

THE ENTRY OF APPELLANT WAS VOID AB INITIO.

The Secretary of the Interior had jurisdiction over appellant's application for a patent. The Land Department was a tribunal with jurisdiction over the parties and the subject matter, and its judgment cannot be collaterally attacked. The Land Department held that as between the United States and the appellant, the appellant's application was void ab initio and a nullity.

In this adjudication the appellant acquiesced, and he cannot attack it collaterally or at all.

U. S. vs. Winona & St. P. R. R. Co., 67 Fed., 955;
New Dunderburg Mining Co. vs. Old, 79 Fed., 602;
U. S. vs. Northern Pac. R. R. Co., 95 Fed., 869;
King vs. McAndrews, 111 Fed. 864;
Knight vs. U. S. Land Ass'n, 142 U. S., 211.

We do not believe that it makes any difference whether the Secretary was right or wrong in his adjudication that the application for a patent and the final receipt were jurisdictionally defective. It suffices that the court decided that it was jurisdictionally defective in a proceeding in which both the United States and the appellant were proper parties.

In United States against Winona & St. P. R. R. Co., supra, certain lands had been erroneously granted to the State for the benefit of the railroad company.

It was held that the decision of the land department was not subject to collateral attack. After a general statement the court proceeds:

> "These authorities and those above cited which we have not reviewed, perhaps sufficiently illustrate the distinction between the cases in which the land department has acted upon a subject-matter within and one

without its jurisdiction. A careful study and analysis of these decisions will show that none of them are inconsistent with the following rules:

(1) A patent or certificate of the land department to land over which that department has no power of disposition and no jurisdiction to determine the claims of applicants for, under the acts of congress, is absolutely void, and conveys no title whatever. Land the title to which had passed from the government to another party before the claim on which the patent is based was initiated, land reserved from sale and disposition for military and other like purposes, land reserved by a claim under a Mexican or Spanish grant sub judice and land for the disposition of which the acts of congress have made no provision, is of this character. Polk vs. Wendal, 9 Cranch, 87, and cases cited under it supra. (2). A patent or certificate of the land department to land over which that department has the power of disposition and the jurisdiction to determine the claim of applicants for, under the acts of congress, is impregnable to collateral attack whether the decision of the department is right or wrong, and it conveys the legal title to the patentee or to the party named as entitled to that title in the patent or certificate. Minter vs. Crommelin, 18 How., 87, 89 and cases cited under its supra. (3). A court of equity may, in a direct proceeding for that purpose, set aside such a patent or certificate, or declare the legal title under it to be held in trust for one who has a better right to it in cases in which the action of the land department has resulted from fraud, mistake or erroneous views of the law."

The effect of this decision is to hold that a ruling of the land department that certain lands had not been so withdrawn from the public domain as to prevent their being certified to a railroad company entitled to a grant in aid of its construction, though such ruling were erroneous as a matter of law, was nevertheless not subject to collateral

attack. In other words, the land department ruled that by certain entries which were subsequently canceled, the lands were not so withdrawn from the public domain as to prevent the land grant from attaching upon cancellation. This ruling was undoubtedly erroneous but within the jurisdiction of the land department to make. That is, the land department had assumed jurisdiction and held in fact that it did have jurisdiction to grant the land to the State of Minnesota in aid of the railroad company; and this ruling in that regard though erroneous, was not void. Per contra it would seem that in a case where entry was attempted and the land department held that it did not acquire jurisdiction, and that the entry was void, the ruling whether erroneous or not would be equally impervious to collateral attack. Where the land department is lacking in jurisdiction over the land itself, its action in attempting to issue a patent is an absolute nullity and may be reviewed and annulled by the courts upon collateral attack. But where the jurisdiction exists over the land itself, and the question is whether the land department by the particular proceedings under consideration acquired jurisdiction to act, then the question of jurisdiction is a matter to be determined by the Land Department itself. If it holds that it has jurisdiction and does act, its ruling though erroneous, is binding upon everyone but the government, likewise when it considers the matter and determines that it never acquired jurisdiction, this rule is equally binding and amounts by deduction to a holding that in effect no entry was ever made; and hence, of course, that no withdrawal from the public domain was accomplished by the attempted entry. It is only upon the supposition that the applicant for patent has done all in his power to secure it, and that the issue of the patent is a mere ministerial act, that the final receipt is given practically the same effect as the patent itself. This

view is based upon the supposition that the proceedings are regular, or at least not wanting in jurisdiction, and that the patent will issue in due course of procedure, and that the consequences of the delay incident to the transaction of business by the land department, and the subsequent lapse of time between the making of the final entry and the issuance of patent are not to prejudice the applicant who has complied with the statutory requirements. Likewise where the entry is canceled for some act or neglect occurring after the making of the entry the same rule would apply, for the entry being apparently valid, and within the power of the land department to allow, the land must necessarily be withdrawn from the public domain so long as the entry remains uncanceled; but in a case where the proceedings were so defective and so far departed from the requirements of the statute that the Land Department never in fact acquired jurisdiction to proceed at all and the land department itself so holds, in the very same proceeding, it would seem that such ruling of the department is an adjudication that it did not and never had jurisdiction, and that the whole proceeding was a nullity, and, like any void judgment was of no more effect than if it had never existed.

We believe, however, that the decision of the Secretary was good law.

It is, of course, recognized law that if service of process is actually made, defective proof of service will not render a judgment invalid, and it may be cured by the substitution of proper proof. The reason is that it is the service of the process which confers jurisdiction, and not the proof of such service.

Section 2325 of the Revised Statutes provides that an applicant for a patent shall post a copy of his plat, to-

gether with a notice of his application for patent in a conspicuous place on the land previous to the filing of his application for a patent, and "shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall *thereupon* be entitled to a patent for the land *in the manner following*: the register of the land office upon the filing of such application, plat, field notes, notices and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claims, and he shall also post such notice in his office for the same period.

Section 2335 provides that all affidavits required to be made under this chapter should be verified before an officer authorized to administer oaths within the land district where the claims may be situated.

Counsel for appellant argue with great earnestness that the *fact* of posting gave the local land office jurisdiction to issue the receipt.

At page 79, it is said:

> "The commissioner and the secretary confuse the *fact* of posting with the *proof* of such posting. The former is jurisdictional; the latter is not. *Without* such previous posting the application can not be carried forward to publication and entry; but if the affidavit of posting be *lost* the *fact* of such posting having actually occurred, and standing undisputed, there is no law or rule of practice known to any court which declares the jurisdiction defeated in the presence of the *fact* simply through error or misplacement in the *proof* of the fact."

We submit that the confusion is in counsel's treatment of the subject, and not with the commissioner and the secretary. The entire argument upon the subject goes

to the *wisdom* of the statute, and while pertinent if addressed to a legislative committee, is, it seems to us, without force as bearing upon the present issue.

Congress specifically prescribes not that the applicant shall be entitled to a patent upon complying with the other provisions of the statute and posting a copy of the plat and notice of the application, but upon doing such things and filing with the register of the Land Office an affidavit that the notice has been duly posted. The register of the Land Office has no authority to accept the application or the plat or the field notes or the notices unless they are accompanied with the affidavit prescribed by the statute.

The filing of the affidavit is a condition precedent to his jurisdiction to act at all, and is also a condition precedent to the applicant becoming entitled to a patent.

The posting of the notice is not the process or the service of process in the proceeding. The application is the complaint. The publication of the notice by the register of the Land Office in the newspaper and the posting of such notice by the register in his office for sixty days constitute the service of the process. The original posting of the notice is one of the steps which are necessary to authorize the register of the Land Office to issue and serve the process, to-wit: to do the publishing and the posting in his office. The filing of the affidavit is another step, and is also essential to the authority of the register to issue and serve the process. Congress has enacted that both of these steps shall be taken before the register of the Land Office is vested with the jurisdiction to issue and serve process, and, to continue the analogy of the proceeding to that of ordinary litigation, the defendants, for whom the United States is in a measure trustee, are all persons known or unknown who have or claim an interest in the property.

The proceeding is similar to an action to quiet title against unknown owners or claimants who are to be served with process by publication, the material difference being that any person may without leave, file his action to quiet title and serve his process, while in this proceeding an applicant is not permitted by law to serve the process, but the statute provides that such process shall be issued and served by the register of the Land Office, but the authority of the register to issue and serve, the process is not conferred until complete compliance by the applicant with certain statutory requirements. No process, therefore, was ever properly issued or properly served. The proceeding lacked jurisdiction from the outset, and was at all times a nullity.

Even if the amended affidavit had any effect whatever, which we think it did not have, it could not have a retroactive effect as against the intervening rights of third parties. Such amended affidavit was not filed until 1907 (Record page 149), and the appellee's amended locations and locations of the Aurora, Tip Top and Lynch were made in December, 1906. Therefore, at the time the appellee made such locations there was certainly no valid application for a patent. We are convinced, however, that the amended affidavit could not have a retroactive effect for any purpose, and the proceedings were at all times a nullity.

A correct illustration will be found in the statutes of some States with respect to the service of process by publication. In the State of New York, for instance, service by publication can only be made upon order of the court, and it is provided by statute that it must appear to the court by affidavit, that the defendant "is a non-resident, and after due diligence cannot be served within the State."

In the case of McCracken vs. Flanagan, 127 N. Y., 493, 28 N. E. 385, an affidavit was presented to a judge stating that the defendant "is a non-resident and can not be found within the State." Upon such affidavit the court granted an order of publication, and the summons was served, judgment entered by default, and real estate sold under execution.

The successors in the interest of the judgment debtor brought an action of ejectment against the purchaser under the judgment sale, thus attacking the judgment collaterally, basing his attack solely upon the ground that the affidavit upon which the order for publication was granted did not show that the defendant could not be found "after due diligence" and that the judgment was void. It was in the record that the judge granting the order had passed finally upon the sufficiency of the affidavit: but the New York Court of Appeals decided in favor of the plaintiff, that the defective affidavit was jurisdictional, and that the order of publication was void, and the judgment subject to collateral attack.

The affidavit executed in this case before a notary public in Texas was no affidavit at all. If false it could not have been made the basis for an indictment for perjury. It may be true that the posting was actually done, as in the McCracken case it might also have been true that the defendant could not, after due diligence, have been found within the State of New York. The fact remains that the legislative power in both cases made the affidavits conditions precedent to the institution of the proceedings, and therefore such proceedings without such affidavits were void ab initio and a nullity.

Counsel for appellant undertake to argue that the Secretary erred in rejecting appellant's application, and

canceling the entry. As has been heretofore suggested, appellant is concluded by the decision of the Secretary from questioning in this action the results of such adjudication.

The appellant did not do his assessment work in the years 1904 and 1905 when appellee located the five claims, and this fact, unexplained, establishes the validity of appellee's locations. To excuse such lack of assessment work, appellee offers his application for patent and the final receipt. If such application had proceeded to patent, appellant would have been relieved from non-performance of assessment work. But it did not go to patent. It was at its own peril that appellant omitted to do its assessment work. It took its chances, and, as stated, in the opinion in Murray vs. Polglase, supra, it can only blame itself for the position in which it now stands. If this court should, as requested by counsel for appellant, collaterally review the judgment of the Interior Department, and upon such review arrive at determination that the department erred in its conclusion, even then this court will be unable to give to appellant any relief.

It appears by the findings that the Commissioner of the Land Office on the 10th of April, 1906, found the entry to be defective for a number of reasons in addition to the reason that the affidavits were not executed within the land district. It was found defective because the Hortense claim contained an excess in area; because the requisite lines were not shown; because the mineral character of the land did not satisfactorily appear; and because the Aluminum and Hortense claims were irregular in shape, and no sufficient reason had been shown for the failure to conform them as near as practicable with the United States system of public land surveys. (R. p. 146.)

No evidence was introduced by the appellant with respect to any of these matters, and it must be presumed that the decision of the Commissioner was as to these other matters correct and that his order rejecting the application would have been affirmed, even if the Secretary had determined that the affidavit was capable of being cured. This first decision of the Commissioner of the Land Office was rendered on the 10th of April, 1906. The appellant made no effort to relocate or to resume its assessment work. Appellee relocated in May, 1906, and the supplemental affidavits were not filed until still later. There are neither allegations nor evidence sufficient to warrant this court in finding, even if it were competent for it to do so, that the judgment of the Land Office was erroneous, and should be set aside in this collateral proceeding.

This position is reinforced by the fact that appellant did not exhaust its remedy before the Land Court by moving for a review. On the contrary, it voluntarily appeared before its time to review had expired and waived its right to do so. It virtually withdrew its application for a patent.

The position of the appellant is analogous to that of one who, in answering a complaint, pleads the judgment of a court of first instance in bar.

Plaintiff, in reply, pleads a judgment of a higher court, reversing the judgment of the lower court.

It is a general law, except where otherwise prescribed by statute, that a judgment is evidence until reversed.

It is certainly inconceivable that the defendant in such supposititious case could claim any effect for a judgment, which under a supplemental pleading the plaintiff showed had been reversed. The final receipt may be considered at most as a judgment entered by a court of original juris-

diction. Until reversed it stood as a prima facie excuse for the non-performance by appellant of its assessment work. When reversed by the higher court it became ineffective for any purpose whatever, and, as has been stated, without respect to whether such judgment were with or without jurisdiction, were erroneous or in accordance with the law. The fact remains that the application for a patent has been forever disposed of, and that the appellant stands here without having performed its assessment work, and with no legal reason for its failure to perform it.

CASES CITED BY APPELLANT.

Hastings &c. R. R. Co. vs. Whitney, 152 U. S., 363;
Whitney vs. Taylor, 158 U. S., 85.

These decisions are based upon the construction of the act of congress constituting a grant to railroad companies. Such act grants to the railroad certain designated lands other than those which are expressly excepted or reserved.

To quote the language of the court on this subject, in Murray vs. Polglase, supra:

> "These exceptions are specifically mentioned, including among others enumerated, those to which 'the right of pre-emption or homestead settlement has attached' or those not 'free from exemption or other claims or rights,' and are held to be excluded from the portion of the grant by the very fact of their existence at the time the grant attaches, without regard to whether they are fraudulent or otherwise."

Noonan vs. Caledonia Mining Co., 121 U. S. 393;
Kendall vs. San Juan Silver Mining Co., 144 U. S. 658.

The former case is construed and explained in the latter and more recent one.

The law in the Kendall case not only does not conflict with the position assumed by appellee, but reinforces it.

By the terms of the treaty between the Indians and the United States government, the mining property in question was set apart for the absolute and undisputed use and occupation of the Indans therein named, and the United States agreed that no persons except those designated and certain officers, agents and employes of the government should ever be permitted to "pass over, settle upon or reside in the territory described."

The location of the Bear lode was made whilst this treaty was in force. The court very properly held that such location was invalid. It was invalid because the ground acquired by a locator is in the nature of a purchase from the United States government, and in that case the United States government had no right to the possession of the land, and therefore could not grant to anyone a possessory title to it.

The location of the Bear lode was invalid because at the time of such location other persons than the United States had an absolute interest in it. Such persons were the Indians protected by the treaty.

As we have repeatedly stated the test of the validity of a location is whether at the time it was made any one other than the locator and the United States government had any interest in the land.

The cases of *Teller vs. United States, Nielsen vs. Champagne M. & M. Co., Aurora Hill, etc. Co. vs.* 85 *Mining Co.*, and *Benson Mining Company vs. Alta Mining Company*, discussed at pages 55 and 56 of appellant's brief, do not sustain its contention.

The doctrine that the applicant is vested with an equitable title to the land after the payment of the purchase price is based upon the fundamental fact that as a matter of law he is *then entitled to* the patent.

As is said in the *Benson Mining Company* case,

"with one voice they (the courts) affirm that when the *right to a patent exists*, the full equitable title has passed to the purchaser." (Italics ours.)

The very language of the statute prescribes when and how the applicant shall become entitled to a patent. Our contention is based upon the proposition that an applicant cannot be entitled to a patent until in addition to the doing of other things required by law, he has filed a proper affidavit with the Register of the Land Office in pursuance of which the Register does the things which consummate in the vesting of the equitable title in the applicant. To cite, therefore, in support of their proposition decisions that the applicant is vested with a full equitable title when his right to a patent exists is to beg the main question, to-wit, that the right to the patent exists.

Southern Cross Mining Company vs. Sexton is not an authority for appellant's contention. In that case the applicant had posted the proper notices and filed the proper papers and proofs with the Register of the Land Office. Having so done, under the language of the statute, he became thereupon entitled to the patent without the obligation upon him to do anything other than pay the purchase price at the proper time, and this he likewise did. He therefore was vested with an equitable title to the property, from which neither the land office nor congress had authority to divest him. His legal title had the patent been issued to him would perhaps have been defective by reason of the omissions of the Register of the Land Office, but this equit-

able title was at no time in doubt, and, therefore, when the Honorable Secretary before patent undertook to require the correction of the department's error in order that there might be no defect in the legal title the Supreme Court of California properly held that the applicant did not thereby lost his rights in the property, and this without respect to any decision which the Secretary might have made.

The decision was based in terms upon the opinion in Lytle vs. Arkansas, 9 How., 314, in which this court said

> "that where an individual in the prosecution of a right does everything which the law requires of him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him."

In *Aurora Hill Consolidated Mining Company against* 85*Mining Company*, 34 *Fed.*, 515, the proceedings in the local land office were regular in all respects. The Commissioner of the General Land Office two years after the papers had been forwarded from the local land office notified the Register and Receiver that he required further proof of the posting of the notice of the claim *during the sixty-day period of publication.*

It thus appears that the additional proof required was of facts subsequent to the time when the applicant became entitled in pursuance of the statute to a patent by filing the required papers in the local land office. Being thus entitled to a patent, and having paid his purchase price, he was vested with the equitable ownership and it followed, as a matter of course, as stated in the portion of the opinion quoted in appellant's brief, that the defendants were mere trespassers and intruders.

Nielsen vs. Champagne M. & M. Co., 111 *Fed.*, 655, was a bill in equity to enforce the conveyance to the plaintiff by the defendant of certain mining claims.

It was alleged in the bill that the defendant had made an application for a patent and had not expended the Five Hundred Dollars required by law upon the claims, and had not done the annual assessment work, and was not therefore entitled to the patent. That the plaintiff had entered upon the claims and re-located them; that the plaintiff had filed a protest in the Land Office against the issuance of any patent to the defendant, which protest had been overruled by the Commissioner of the General Land Office, whose decision upon appeal had been affirmed by the Secretary of the Interior.

The theory of the bill was that the decision of the Commissioner and of the Secretary were errors of law which might be reviewed in the courts, and it was prayed that the defendant should transfer the title to the plaintiff.

We regard this case as an authority for our contention.

In that case the Secretary of the Interior had decided in favor of the applicant, and the court refused to consider the plaintiff's bill, holding that his proper remedy was to induce the government to proceed to set aside the entry. Necessarily, the court held that plaintiff's location was invalid for the reason that it was bound by the decision of the Secretary to the effect that the defendant was vested with an equitable title to the premises at the time of plaintiff's location.

THE DECISION OF THE SECRETARY CANCELLING THE ENTRY IS BINDING AND CANNOT BE ATACKED IN THIS PROCEEDING.

Counsel for appellant admit this proposition of law as laid down in the opinion of the territorial supreme court, and in the case of Smelting Company vs. Kemp, 104 U. S.,

636, and Knight vs. United States Land Association, 142 U. S., 161; but endeavor to attack their force by the suggestions.

First, That the Secretary's decision amounted to a mere construction of the law, and therefore is not binding; and

Second, That to attack the Land Department's action in this case is not a collateral attack upon it.

We submit that both of such grounds are faulty.

As has been heretofore stated, the Commissioner of the Land Office by its decision in April 10, 1906 (R. pp. 145-6), found the entry to be defective in a number of particulars. The appellant was given an opportunity to show cause why the entry should not in pursuance of such decision be canceled, and it has never done so and such original decision has become unappealable and is now binding.

Even if such had not been the case and the entry had been objected to on the sole ground of the insufficiency of the affidavit, even then the canceled entry would be res adjudicata. The court finds in pursuance of the stipulation of the parties (R. p. 9) that on the 24th of November, 1908, "the appellant waived before the Honorable Secretary its right to make a review of such decision, and thereupon such decision and the cancellation of said entry became final and such entry was canceled on the records of the land office" (R. 149).

The decision was rendered by the Secretary on the 9th of September, 1908; appellant's relocations were made on the 11th day of September, 1908 (R. 152), and on the 25th of November, 1908, the appellant filed in the local land office its application for the patent which is being adversed in this action. (Finding XIII, R. p. 152.)

It appears therefore that the appellant did not merely fail to move for a rehearing and thus exhaust its remedy before the Secretary of the Interior.

On the contrary, two days after it was filed, aware of the many imperfections in its prior locations and of the decision of the Commissioner of the Land Office in 1906 holding them to be defective in many ways, it determined to accept the Secretary's decision and to re-locate the ground, and did so as appears within such two days. Then before its time to move for a rehearing had expired, and with the evident purpose that the new locations upon which they intended to rely should not be imperiled by the pendency of its application for a patent and entry, and intending to apply at once for a patent under its new locations, it appeared before the Secretary, and by formal act accepted the Secretary's decision as final, and waived its right to review.

It thus foreclosed itself forever from asserting that such decision was erroneous or from asserting any right whatever under such application for patent and such canceled entry; and on the following day it made the application for patent which is being adversed in this action.

As far as the appellant is concerned its own deliberate action made such canceled entry and the application which preceded it as if they had never been save and except as to the legal effect which any canceled and defective entry might have upon locations such as appellees which were made prior to its cancelation.

THE ACTION OF THE LAND DEPARTMENT CANNOT BE REVIEWED IN THIS ACTION.

Assuming, however, arguendo that the decision of the Secretary was erroneous and is not res adjudicata and was

not waived by the appellant, nevertheless, we submit that it cannot be reviewed in this action.

As said in *Aurora Hill Consolidated Mining Co. against* 85 *Mining Company, supra*, the officials of the Land Department

> "like other officers err in regard to matters of law and the correct interpretation thereof. In such cases upon proper proceedings had for that purpose their judgments or decisions may be reviewed by the courts and corrected if erroneous. This can only be done by a direct proceeding for that purpose upon proper allegations disclosing fraud, mistake or other matters complained of."

Counsel argue, however, that to review the legality of the cancellation of appellant's entry is not a collateral attack upon the Land Department's action, and cite two cases, neither of which in our opinion supports the proposition.

Rebecca Gold Mining Company vs. Bryant, 71 *p.* 1110, 31 *Colo.* 119, which is counsel's main contention, presents an entirely different set of facts.

The Honorable Secretary simply made a mistake. The owners of the Rebecca claim were entitled to a patent upon the land in conflict when the land officer gave them the Receiver's receipt which correctly described it. The Commissioner of the Land Office, misled by a prior mistake in the description, the fact of whose correction had escaped him by inadvertence, of his own motion changed the description and excluded from the patent the territory in dispute.

His action was not judicial. There was no conflict or contest, and he gave no notice to the applicant of his action and the applicant received the patent in ignorance of the mistake which the Land Department had made.

The court held that the action of the Commissioner was void, not voidable, not due to erroneous construction of law, but absolutely void, and it appeared that the Commissioner of the Land Office had himself subsequently ruled that such action was "wholly unauthorized and void." It seems unnecessary to further urge this manifest distinction.

The other case cited by counsel, *Southern Cross Co. vs. Sexton*, has been heretofore discussed.

The decision was based as we have seen upon the fact that the ministerial mistake of the officers of the Land Department could not be effective to deprive an applicant of the right to a patent to which he had become entitled by a complete performance of all the requirements imposed upon him by the statute. While he held his final receipt and while his entry remained uncanceled although defective, the defendants applied to the United States Land Office for a patent. The plaintiff, who was the applicant and the owner of the equitable title, filed its protest and adverse claim to the issuance of the patent and regularly commenced the suit.

The complaint was filed on the 22d day of December, 1900. In November, 1901, a year after the suit has been commenced, the defendants moved the department asking that plaintiff's final receipt be canceled, and on April 22, 1902, the Secretary of the Interior canceled it and declared that it must be treated as canceled of date July 23d, 1895. This action of the Secretary was taken without a hearing given to the applicant.

The decision of the Supreme Court of California is that the Secretary "in promulgating the order for retroactive cancellation of the certificate without notice to the bona fide owners thereof, under the circumstances pre-

sented without controversy, in this case acted arbitrarily and in excess of his powers, and as a matter of equity his ruling cannot be given judicial effect."

The court quotes from the opinion of this court in Parsons vs. Venzke, 164 U. S. 89, in which this court determines that the jurisdiction of the Land Department is not an arbitrary one, "to be exercised *without notice to the parties interested.*" (The italics are ours.)

This decision therefore is in effect that the action of the Secretary was void, and the Supreme Court of California assumed to review it upon such ground, and not upon the ground that it was merely erroneous.

Moreover, perhaps the court might find a ground for reviewing collaterally a decision of the Land Department for an error of law where such decision was rendered in a proceeding before the Land Department which was commenced after the action in which the court assumes to so review it.

Our analysis of this action would lead us to a conclusion with respect to it somewhat different from that which is expressed in the opinion of the Supreme Court of California.

We question whether the retroactive provision in the decision of the Secretary had any effect whatever. It does not seem to us that either the word "retroactive" or the words "not retroactive" are properly applicable to a decision as to the validity or invalidity of a final receipt. A decision that the final receipt and entry were invalid would, in our opinion, necessarily mean that it always had been invalid, and that therefore that portion of the Secretary's opinion declaring it to be retroactive was meaningless and superfluous.

In our view the judgment of the Supreme Court of California was correct upon the ground as heretofore stated, that the original applicant having done all that was required of him to be done, became vested with an equitable title, or, in other words, with a right to a valid final receipt, of which he could not be deprived.

In concluding this entire subject, we again invite the court's attention to the language of section 2325 of the Revised Statutes which appears at page 147 of the record, and which provides that upon doing certain things including the posting and the filing of the application for a patent and other papers and proofs in the Land Office, that the applicant "*shall thereupon be entitled to a patent for the land.*"

The grantor of the Southern Cross Gold Mining Company had done these things and therefore had become entitled upon paying the purchase price to a valid final receipt. He paid the purchase price and procured what the Honorable Secretary determined to be an invalid receipt. Conceding therefore that the final receipt was and always had been invalid, nevertheless for the reasons given in the opinion and stated by this court in Lytle vs. Arkansas, supra, the applicant was still entitled to a patent. Such determination, however, was not inconsistent with nor did it even tend to impair his right to a valid final receipt and to a consequent patent.

The principle of the decisions which hold that one who has a final receipt need not do his annual assessment work would apply equally to one who had done all things required of him by law to entitle him to a final receipt.

Therefore, without respect to the decision of the Secretary canceling the invalid final receipt or its retro-

active effect, the applicant fully recognizing the decision and its justice (assuming that it had been rendered upon notice to him, which it was not) would have still been entitled to the possession of the premises by reason of his having complied wifh the statute. Therefore, the Supreme Court of California properly rendered judgment in favor of the Southern Cross Gold Mining Company, although in our opinion, some of its reasoning was not in entire harmony with the underlying principles of mining law.

VI.

THE TERRITORY EMBRACED WITHIN APPELLEE'S CLAIMS WAS A PART OF THE PUBLIC DOMAIN.

As a final point, the appellant urges that there was no proof that at the time of the appellee's locations, the ground embraced within them was unoccupied public land, subject to location, and hence that the locations were invalid.

It is in effect admitted by the pleadings that the land embraced within appellee's locations was a part of the public domain except insofar as appellant's locations segregated it therefrom.

It is alleged in paragraph III of the complaint:

"That the plaintiff on the 12th day of September, A. D. 1908, by reason of discoveries theretofore by him made within the premises hereinafter described of valuable mineral deposits upon unappropriated mineral lands of the United States subject to location and purchase and divers locations thereof made and maintained by him and his grantors under and by virtue of a full compliance with the laws of the United States and of the Territory of New Mexico and within the local rules and customs of miners applicable to the locations upon the public domain of the United States of Placer Mining Claims, and was and still is entitled to the possession of the following described premises,

and tracts of land situated all in Section 9 of Tp. 29 South of Range 4 East, and in the County of Dona Ana and Territory of New Mexico, to-wit:" &c.

The complaint consists of seven paragraphs separately numbered, the last of which consists of two subdivisions. Such second subdivision is unnumbered.

The first seven paragraphs of the answer consist of admissions or denials of the correspondingly numbered paragraphs of the complaint, and the eighth paragraph of the answer, answers the unnumbered subdivision of paragraph VII of the complaint. Paragraph III of the answer is in response to the above quoted paragraph III of the complaint and is as follows:

"It (defendant) denies that the plaintiff on the 12th day of September, A. D., 1908; or at any other time, was or now is entitled to the possession of the property described in paragraph three of the plaintiff's complaint or any portion thereof, and denies that the plaintiff or any grantors of the plaintiff ever made any valid locations of the property therein described, or even complied with the laws of the United States or the laws of the Territory of New Mexico, or that any rules and customs applicable to the location upon the public domain of the United States of the mining claims, lands and premises in said paragraph of said complaint described as by the said plaintiff in said paragraph alleged."

This paragraph is an admission that the land embraced in appellee's locations was part of the public domain.

The ninth paragraph of defendant's answer is as follows:

"This defendant denies each and every allegation contained in said complaint not herein expressly by this defendant admitted to be true, and denies that the plaintiff is entitled to the relief or any part thereof by it prayed for, or to any relief whatsoever."

In the tenth and last paragraph of the answer, the defendant alleges that "on the 12th day of September, 1908, and for several years prior thereto before the assertion by plaintiff of any right or claim to any portion thereof," the land in question "was embraced within valid mining locations," copies of which were annexed to the answer, and which were the locations of the Hortense and Aluminum claims.

The case was tried upon the theory that the appellant's locations were prior to those of anyone else, and that the appellee's locations were valid if they conform to the law and if appellant's locations had become forfeited as contended for by appellee.

The defendant made no motion for a non-suit either at the close of plaintiff's case or at the close of the testimony, and the matter on the 13th of December, 1909 (R. p. 71), was argued and submitted to the court for its decision. It was not until more than a year after, December 17th, 1910 (R. p. 67), when the court rendered judgment in favor of the plaintiff, that the defendant even inferentially called attention to the point now raised.

It is submitted, that in view of the categorical pleading to each of the allegations of the complaint, the general denial of paragraph IX should not be construed as raising the issue which is the basis of appellant's present contention.

In many jurisdictions a general denial, such as that contained in paragraph IX of the answer, is held to be ineffective.

I Ency. Pl. and Pr., 802, and

Cases cited.

"The court in construing it (such a general denial) will resolve all doubts against it and hold that

it admits allegations unless it positively indicates a purpose to make the question it purports to be in issue, one of the contested issues on the trial."

1 Ency. Pl. and Pr., p. 804.

and cases cited in Note 1.

"A general denial in an answer of all allegations not expressly admitted or qualified is inapplicable to a subject as to which specific answer is made."

Davenport vs. Ladd, 38 Minn., 545; 38 N. W. 622;

The case of Althouse vs. Town of Jamestown, 91 Wis., 46; 64 N. W., 423, seems to be precisely in point.

The Wisconsin statute is substantially the same as that of New Mexico. In that State the defendant is required by answer in order to create an issue, to interpose "a general or specific denial of each material allegation of the complaint controverted by it, or of any knowledge or information thereof sufficient to form a belief."

In its opinion the Court said:

"The answer then proceeds to admit various portions of the complaint, making affirmative allegations in respect to the matters therein referred to; and this is followed by specific denials of various portions, when the portion in relation to giving notice of injury, already quoted appears. The portion of the answer relating specifically to the question of notice is so clearly insufficient as to operate as an admission of the allegations of the complaint on that subject, and the general denial, it would seem, should be restricted in its operation and effect to matters not specifically treated in the answer. It is doubtful if the pleader has any right, after having gone over the complaint in detail—whether by sufficient denials or not—to expect a denial such as the answer opens with in this case will serve to take away from the remainder of the answer its defective character. Such denial ought rather to be restrained to matter not expressly re-

ferred to, or attempted to be covered, by the specific allegations of the answer. It is neither a general nor a specific denial, within the meaning of the statute."

The rule is based on fairness and equity. It is not the purpose of the law to trap either party to a litigation. When an answer as in this case, treats in separate paragraphs each separate paragraph of the complaint, and answers and denies with respect to them, it is reasonable that both court and counsel for plaintiff should conclude that there is no necessity to prove matters which in such categorical denials remain undenied.

A fair and equitable construction of the pleadings, especially in view of the conduct of all parties at the trial, justified the court in concluding that the plaintiff had made out its affirmative case.

It seems to us that this case by reason of the theory upon which it was tried is squarely within the decision in Brown vs. Gurney, supra, where the same sort of tacit assumption existed, and where it was held that the question could not afterward be raised.

This case differs widely from the cases cited by counsel for the appellant. In each of them the point was distinctly urged at the trial by motion for non-suit and an opportunity given to furnish the required proof.

Moreover, an examination of the cases cited, shows that the language used was with reference to a situation of an altogether different character. In each of such cases the existence of a prior location was proved and the Court held that its continuance in the absence of proof by plaintiff would be presumed. Thus, in Lozar vs. Neill, 37 Mont. 287, 96 Pac. 343, the defendant's claim, the Violet Jane, was located January 1st, 1898; the plaintiff's claim, the Sunrise, was located in June, 1898. The plaintiff himself

testified that he knew of the existence of the Violet Jane location, but offered no evidence that it had been either abandoned or forfeited. Under such circumstances it was held that he must show that the land was open to location, and having shown that a prior location existed and not showing that it had ceased, he had failed to prove the ground open to location and was properly non-suited.

In Kirk vs. Meldrum, 28 Colo. 453, 65 Pac. 634, the evidence offered by the plaintiff showed the existence of a prior location covering the same ground which was in possession of the defendants and did not show the lapsing or ceasing of the prior location.

So in McWilliams vs. Winslow, 34 Colo. 341, 82 Pac. 528, the same situation was presented. It was shown that nearly nine years before the plaintiff's location, the ground had been located by the defendant and his grantors, and nothing was shown with reference to the termination of such former location.

It is with reference to such situations that the general language used by the courts applies, and even then only where the point was distinctly urged at the trial.

In the instant case, an entirely different situation is presented. The plaintiff not only showed his own locations, but affirmatively proved that the ground was open to location by proving the termination of the rights acquired by the defendant under its locations. He not only proved valid locations by the plaintiff, but conceding that defendant's locations had existed at one time, proved that they had terminated by forfeiture, by showing the failure to file the proper affidavit and thus raising a presumption that the annual work had not been done, which presumption was not overcome.

"When plaintiff made his proof, as he did, of citizenship, and that he had made a discovery of gold-bearing quartz in the land, and had shown a location according to the requirements of the law, he established his case prima facie, and he was not called upon to make further proof that the land was unoccupied mineral land of the United States. It was shown to be public land, and the presumption is that all public land is unoccupied."

Goldberg vs. Bruschi, 81 Pac., p. 24, 146 Cal. 291.

Again, appellant alleges in its answer that at the time when the appellee avers that he was entitled to the possession of the premises in dispute and for several years prior thereto, *such premises were embraced within valid mining locations of the appellant, etc.* (R. p. 8.)

It follows, therefore, that if the premises in dispute were as alleged in the answer embraced in *valid mining locations* of the appellant, then the lands in dispute were of the unappropriated public domain of the United States save so far as appropriated by the appellant, for were such lands subjected to an appropriation by a third party then the locations of the appellant were invalid and not valid as alleged in the answer. The appellant is now estopped from alleging contrary to the averments in its answer.

Furthermore, the appellant requested the court to find that the lands in dispute were embraced in its mineral locations at all times from the several dates of the making of the same *and that such locations were valid.* See record page 67. And the court did in fact find as requested by the appellant that such locations were valid. Therefore, repeating what was said above, if the appellant's locations were valid at all times from the making thereof then the lands embraced therein were of the unappropriated public domain of the United States save so far as appropriated by

the appellant and the appellant is now estopped from alleging that it was not shown by the appellee that the lands were of the unappropriated public domain of the United States.

The location notice of the Hortense and Aluminum claims are made a part of the answer, and it is stated in each of them that the territory was a part of the unsurveyed public lands of the United States; and it is further alleged that the defendant holds all of the said claims under and by virtue of such original and the amended location notices.

The fact that appellant's first application for patent was not adversed by anybody and its present application by the appellee only perhaps also raises a presumption that the land was unappropriated public domain at the time of all of the locations mentioned in the complaint and the answer, except insofar as it had been located by the parties to this action.

The trial court found as a fact that the land was unappropriated public domain in April, 1905, at the time when the Lulu and Agnes claims were first located, and as a conclusion of law, that the territory covered by the locations was public domain at the time of the re-locations of the Lulu and Agnes, and the locations of the other three claims.

While this finding is denominated a conclusion of law, it is a finding of fact and will be so regarded. The Supreme Court adopted the findings of fact made by the trial court and affirmed the judgment. This particular finding of fact being among the conclusions of law was either inadvertently omitted by the Supreme Court from its statement of facts, or that court regarded it as a proper conclusion of law and as not having been made an issue by the pleadings. While the point was assigned as error to the Supreme Court the

opinion makes no reference to it. We think, therefore, that its interpretation of the pleadings and of the practice of New Mexico should not be disturbed.

Brown vs. Gurney, Supra, was tried upon an agreed statement of facts, one of the provisions of which was as follows:

> "provided, however, that it is not admitted that at the time of said location on the ground embraced within said location was a part of the vacant and unappropriated public domain."

The election by the Kohnyo claimant of the northern end of the claim, and the abandonment of the southern end was filed on June 14th, 1898, and, under the decision of this court upon that day the land became open to location.

The Hobson's Choice location, which was upheld, was made on June 23, 1898, nine days after the ground had been thrown open to relocation. Counsel for appellant conclude their brief as follows:

> "It is a matter of common knowledge in mining regions that the same land is frequently covered by several locations, and in the light of this well known fact, the omission in the plaintiff's proof must be held to be fatal."

Had this court adopted such a view in Brown vs. Gurney it would have been constrained to reverse the judgment.

Even as the Supreme Court of New Mexico did not attach sufficient importance to this point to refer to it in its opinion, so it seems that this court did not think it necessary to make reference to it. We infer that the point was raised from the statement of the following proposition, in the brief of the counsel for Gurney:

> "Where a certain fact is accepted in the trial court and the trial proceeds without objection upon the as-

sumption that such fact exists, and the court decides the cause, relying upon such assumption, neither party will be heard in the court of review to question the existence of the fact," citing many cases.

The testimony and proceedings at the trial have not been certified to this court and it is quesitonable whether under the statute this court if they had been certified to it, would have had jurisdiction to examine them.

It is the general rule that every presumption should be indulged in favor of the correctness of the decision of the lower court. Therefore, it should be presumed that the Supreme Court which had before it such testimony and proceedings, found in them sufficient reason for paying no attention to this purely technical consideration.

VII.

THE ORIGINAL LOCATIONS OF THE HORTENSE AND ALUMINUM WERE VOID FOR THE REASON THAT THE LOCATORS WERE DUMMIES USED BY APPELLANT TO THE END THAT IT MIGHT EVADE THE UNITED STATES LAW AND LOCATE MORE THAN TWENTY ACRES OF LAND IN ONE CLAIM.

It appears by Findings I and II (R. pp. 140-1) that the original locators of the "Hortense" and "Aluminum" claims covered 160 acres each and were made by eight persons, one of whom, W. F. Robinson, appears by the verification of the answer to be President of the appellant: and by Finding IV that these locators conveyed the claims to the appellant without consideration. It is manifest that the locators, as such, were acting in the interest of the appellant.

It has been expressly held that under section 2331 of the Revised Statutes, a claim located by three persons, acting in the interest of a corporation, must be limited to twenty acres.

Gird vs. Cal. Oil Co., 60 Fed., 531.

This case has never been modified or distinguished, but has been frequently cited with approval.

When the locators have knowledge of the concealed interest, the entire location is void.

Cook vs. Klomos, 164 Fed., 529.

The facts in that case are very similar to those in ours. At page 538, the Court says:

> "In Gird vs. California Oil Co. (C. C.), 60 Fed., 531, 545, Judge Ross held that under section 2331, Rev. St., a claim located by three persons must be limited to 20 acres when it appears that they are in the employ and acting in the interest of a single company."
>
> "The mineral land laws of the United States are extremely liberal in the requirements under which possessory rights may be acquired. The few restrictions imposed are only intended to prevent the primary location and accumulation of large tracts of land by a few persons, and to encourage the exploration of the mineral resources of the public land by actual bona fide locators. The scheme of using the names of dummy locators in making the location of a mining claim for the purpose of securing a concealed interest in such claim appears to be contrary to the purpose of the statute; but when this scheme is used to secure an interest in a claim for a single individual, not only concealed but in excess of the limit of 20 acres, it is plainly in violation of the letter of the law, and when as in this case, all the locators had knowledge of the concealed interest and were parties to the transaction, it renders the location void."

VIII.

We respectfully submit that the judgment should be affirmed.

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